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HARVARD LA

Transcript Appeals.

Vol. 7.

THE

FILE OF OPINIONS

IN CASES ARGUED BEFORE THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

DURING THE

JUNE TERM,

1868.

FROM OFFICIAL COPIES CERTIFIED BY

JOEL TIFFANY, State Reporter.

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JAMES G. GREENE,

ROCHESTER, N. Y.

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Transcript Appeals.

JUNE TERM,

1868.

JOSHUA Y. BLANCHARD, APPELLANT, *v.* HIRAM P. TRIM AND ORLANDO K. WEEKS, RESPONDENT.

Contract—Parol—Delivery—Statutes of Frauds—Rescission.

An agreement to purchase back a quantity of lumber, which had been sold and delivered, but had not been paid for by the party holding the same, is a re-purchase; and, if the amount exceed fifty dollars, it must be in writing or be in part executed, to take it out of the Statute of Frauds.

C. purchased of B. a quantity of lumber, for which he gave his note payable in three months. Before the note became due, he informed B. that he could not meet the payment, and requested B. to buy back the lumber. They agreed upon the terms by parol, and B. was to take away the lumber as soon as the weather would admit. Before taking away the lumber, it was levied upon by the sheriff as the property of C. *Held,* that the title was in C., and the levy good as against B.

THIS action was commenced before a Justice of the peace in the town of Saratoga Springs, on the 21st day of February, 1857, and was for taking and carrying away lumber belonging to the Plaintiff. The defence was, that said lumber was the property of one J. H. Calkins, and as such had been levied upon

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Contract—Modification by parol—Consideration. 44 *N. Y.* 542; 48 *N. Y.* 383; 60 *N. Y.* 419; 13 *Abb. N. C.* 297; 6 *Lans.* 420.

Statute of frauds—Contracts—Verbal modification. 147 *N.* . 409 (70 *St. Rep.* 49); 144 *N. Y.* 711 (71 *St. Rep.* 286); 48 *Super. Ct.* 264.

Sale—Rescission...30 *Misc.* 123 (61 *N. Y. Supp.* 866). ..

by the sheriff, under execution in favor of Defendants. The Justice gave a judgment in favor of Plaintiff for $70.56. The case was appealed to the County Court, where the judgment of the Justice was affirmed. The case was then appealed to the General Term of the Supreme Court, where the judgment was reversed, and thereupon the Plaintiff appealed to this Court.

The following is a brief statement of the facts:

The Plaintiff sold and delivered to Calkins in November, 1856, a quantity of lumber, and took therefor Calkins' promissory note of $134, dated November 28, 1856, and payable at the Commercial Bank of Saratoga Springs, three months thereafter. On the 5th day of February, 1857, Calkins called on the Plaintiff, told him that he would not be able "to meet the obligation when it became due," and asked the Plaintiff to buy back the lumber. The Plaintiff went to Calkins' shop and looked at the lumber, and it was agreed between them that the Plaintiff should take it back, and should draw it away as soon as the weather would permit—Calkins agreeing to account to the Plaintiff for what had been sold or used by Calkins. The note was then in the Commercial Bank, where it had been left by the Plaintiff, and from which it was taken by the Plaintiff on the 11th day of February, 1857. On the 9th day of February, 1857, by the direction of the Defendants, and in virtue of an execution issued on a judgment recovered by them on the 7th of the same month against Calkins, the sheriff levied upon the lumber, the same not having been actually removed by Blanchard from the possession of Calkins, and sold it by virtue of the execution.

A. Pond for Appellant.
J. C. Hulbert for Respondents.

HUNT, CH.J.—The facts in this case are substantially undisputed, and the questions of law arising upon them are the only subjects for our consideration.

The lumber in question had been sold and delivered by Blanchard to Calkins, and a portion of it had been used by Calkins

in his business. Finding himself unable to pay for it, he requested Blanchard to "buy it back," and upon an inspection of the lumber by Blanchard in the presence of both parties, the lumber then being before them, it was agreed between them that the lumber should be taken back by Blanchard, and that he would draw it away as soon as the weather would permit. Before the lumber was drawn away the sheriff levied upon it, by order of the Defendants, upon an execution against Calkins. The Respondent claims that the title to the lumber did not pass to Blanchard before the levy, for the reason that there was no actual delivery of the possession, and that the Statute of Frauds intervenes and declares such a sale void.

On the part of the Appellants it is urged that the transaction was a rescission simply of an existing sale, and that under such circumstances the title passed to the original vendor.

As a simple sale by Calkins to Blanchard on the 5th of February, it cannot be sustained under the Statute of Frauds. The delivery was not sufficient (Shindler v. Houston, 1 N. Y. 261; Bailey *v.* Ogden, 3 Johns 399).

Does this transaction amount simply to a rescission of the contract of sale, and are the provisions of the Statute of Frauds inapplicable to such a case? It is insisted that such is the law, and among others the case of Cummings *v.* Arnold, 3 Met. 486, is cited to sustain the claim. In that case the Judge quotes this remark from an English report hereafter cited: "It is to be observed that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is that no action shall be brought unless they are in writing; and there is no clause which requires the dissolution of such contracts to be in writing."

The case of Cummings v. Arnold simply decided that the terms of a written contract for a sale of goods might be varied by a subsequent parol contract. The written agreement was to manufacture and deliver certain cloth at a fixed price per yard on eight months' credit. An agreement was subsequently made by parol to pay cash for the goods upon a discount of five per

cent. The Court held the subsequent agreement to be good. The holding was sound, and is supported by numerous authorities. The statute requires the making of the contract to be by writing, but it does not undertake to regulate its performance, nor does it say that it shall not be varied by parol. That is left to be decided by the general rules of law and evidence (3 Law Reports, Com. Law series, p. 272; Cuff *v.* Penn. Maule & S. 21; Goss *v.* Nugent, 5 B. & Ad. 58).

Thus in the present case, I doubt not that the terms of payment by Calkins and Blanchard could have been modified at the pleasure of the parties, and the original sale would have furnished a sufficient consideration for such agreement. I am of the opinion, however, that a transfer of the lumber by Calkins to Blanchard, after he had bought the lumber and held it for three months in his possession and used a portion of it in his business, does not come within this principle. It is a resale, and not a modification or a rescission of an existing contract. Where the title of the vendor has not been perfected for any reason, where there has not been a perfect delivery, where fraud has occurred, or where the contract in any respect remains executory, the idea of a recission is quite appropriate. Where the same contract, in its essentials, is altered in its details, we at once appreciate the proposition of a modification. The contract before us does not come within either of these principles. It is a new contract simply. Being satisfied that he cannot pay for the lumber as agreed, Calkins proposes to Blanchard "to buy it back."

This language expresses the precise legal idea that the law entertains of the proceeding. Calkins, being the owner, proposes to Blanchard to sell him the lumber, and Blanchard assents to the proposition that he should buy it back. It might have been for the same price paid by Calkins or for a less or a greater price, without affecting the character of the transaction. This is essentially a new contract, and not a rescission or modification of an existing contract. Numerous cases are found in the books where the question of rescission has arisen,

and in all of them that I have been able to examine, with the exception of Salte *v.* Field, 5 Term 210, it appears that the property had never been delivered to the purchaser, or had been re-delivered by the purchaser to the original vendor or his agent. It was thus an executory contract simply, or a completed sale upon the new arrangement. In some cases the question has arisen between the parties themselves, and in others the rights of creditors have intervened, but in each of them it will appear either that no original delivery had been made, or that there had been an actual re-delivery to or for the benefit of the claimant (Sturtevant *v.* Orser, 24 N. Y. 538; Ash *v.* Putnam, 1 Hill, 302; Berly *v.* Taylor, 5 Hill, 577; Atkin *v.* Barwick, 1 Strange, 165; Salte *v.* Field, 5 D. & E. 214). In the case last cited, the goods were in the hands of the vendor's agent, from which they had never departed when the vendee assented tc their return to the vendor. There was an evident desire in that case to rescue the goods from the hands of the assignees of a bankrupt, and to place them where they honestly belonged. Upon a careful examination of the cases, I am of the opinion that this case must be decided upon the language of the statute relating to contracts generally, and that there was not a sufficient delivery to make the re-sale a valid contract. See also Miller *v.* Smith, 1 Mason, 437; Chapman *v.* Searle, 3 Pick. 38.

GROVER, J.—Calkins acquired a perfect title to the lumber in question by the sale and delivery of it to him in December, 1856.

There is no conflict in the evidence as to these facts. The real question in the case is whether the Plaintiff re-acquired title from Calkins on the 5th of February, 1857, some four days prior to the levy of the execution. That this transaction was not valid as a sale of the lumber by Calkins to the Plaintiffs is manifest.

Sec. 3, vol. 2, page 195, 3d ed. R. S., enacts that every contract for the sale of any goods, chattels, or things in action for the price of fifty dollars more, shall be void unless, 1st, a note

or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby; or 2d, unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or 3d, unless the buyer shall at the time pay some part of the purchase-money. None of these requisites were complied with, unless a delivery of the lumber and acceptance by the Plaintiff is to be implied from the fact that the parties, at the time of making the agreement, were at the place where the lumber was and saw it. But that a delivery and acceptance could not be implied from these facts was expressly determined by this Court in Shindler *v.* Houston, 1 N. Y. 261. That this case was rightly determined has never since been questioned.

It is insisted by the counsel for the Appellant, that although the bargain between the Plaintiff and Calkins, viewed as a sale, is void under the statute, yet that the same is effectual as a rescission of the contract of sale from the Plaintiff to Calkins made in December, 1856, and that by such rescission the Plaintiff was reinvested in his original title. To sustain this position several authorities are cited, the earliest of which is Atkin *v.* Barwick, 1 Strange, 165. In that case Cripp & Co. had ordered goods from the Defendants, who forwarded them pursuant to the order, and charged them in account. After the arrival of the goods, Cripp & Co., finding their affairs in a bad condition, deposited the goods with a third person for the Defendants, and afterwards wrote the Defendants, advising them of the facts. Before the receipt of the letter by the Defendants, a commission of bankruptcy was issued against Cripp & Co. Upon the receipt of the letter, the Defendants assented to the receipt of the goods in their behalf by the third person. The Court held that the title to the goods became reinvested in the Defendants upon their receipt by the third person for them, and assigned as a reason for this judgment that the contract between the Defendants and Cripp & Co. was rescinded by these acts.

Although this judgment has been much criticised in subse-

quent cases (Harman *v.* Fisher, 1 Cowper, 117; Neate *v.* Ball, 2 East, 116), yet the rule has been since followed (Smith *v.* Field, 5th Term, 402), and was applied by this Court in Sturtevant v. Orser, 24 N. Y. 538. In none of these cases, however, was there any question upon the Statute of Frauds, the goods in every instance having been actually delivered by the vendee to a third person for the vendor, the only question being as to the time when title was reacquired by such vendor, whether at the time of the delivery of the goods to the third person, or of the assent thereto by the vendor. It was held that the title vested at the time of the delivery to the third person for the vendor. These cases may well be upheld upon the principle that the subsequent ratification by the vendor of the act of the third person in receiving the goods for him made the act valid from its inception, the ratification relating back to that time. It is a familiar principle that when one assumes as agent for another without authority, a subsequent ratification will render the act valid from its origin. The subsequent ratification, then, by the vendor of the act of the third person, in receiving the goods for him, renders such receipt the same as though the goods were received by the vendor himself; and such delivery of the goods by the purchaser to the vendor, pursuant to an agreement to take them in satisfaction of the debt for the purchase price, or any other debt, would constitute a valid sale of the goods, and the title would vest accordingly.

But in the present case there was no delivery of the lumber to the Plaintiff, or to any one for him. The contract as a contract of sale was valid by the statute. The title having wholly passed to Calkins, by the sale to him in December, he could not pass it to the Plaintiff by any act of his short of what was equivalent to a sale. Suppose, instead of giving his note, Calkins had paid cash for the lumber, and the subsequent agreement had been that the Plaintiff should take it and pay him therefor an equivalent in money. It is evident that this would have constituted a sale of the lumber from Calkins to the Plaintiff. It is none the less a sale because the Plaintiff was to pay by sur-

rendering up the note of Calkins, whether such note was given for the original purchase price of the lumber, or anything else.

My conclusion is, that when the title has passed to a purchaser of chattels, and there are no facts giving to either party a right to rescind the contract by his own act, without the assent of the other party, any contract between them by which the title is to be passed back to the vendor is within the Statute of Frauds, the same as any other sale of the same property. It is unnecessary to inquire whether the statement upon which the judgment was entered was sufficient as against the creditors of Calkins. The Plaintiff's claim is not in that character. The judgment is clearly valid as to Calkins, and the Plaintiff has no more right to question it than Calkins.

The judgment of the Supreme Court, reversing that of the County Court and Justice in favor of the Plaintiff, must be affirmed, on the ground that the Plaintiff had no title to the lumber at the time of the levy of the execution.

All affirm.

JOEL TIFFANY,
State Reporter.

ISABELLA DRAPER, APPELLANT, *v.* IRENE STOUVENEL Ex., &c., OF JOSEPH STOUVENEL, DEC.

Referee's Report—Question of Fact—Legal Error—Bar.

Whenever a question of fact is found by a Judge or Referee contrary to what the undisputed evidence requires, a legal error is committed, which may be corrected on appeal to this Court.

When it is clearly in evidence that the cause of action sued upon was barred by a judgment for the same cause rendered in a former suit between the parties, the finding by the Judge that such judgment is not a bar, raises a question of law for the determination of this Court.

This action was brought by the Plaintiff against the Defendant's testator, to restrain him from prosecuting the Plaintiff for the recovery of rent claimed by the testator to be due upon two leases of certain real estate in Broadway, in the city of New York, given by the testator and others to one Earle, and by the latter assigned to the Plaintiff; also to reform a chattel mortgage, given by the Plaintiff to Earle, and by him assigned to the testator, and an agreement accompanying the same so as to conform said instruments to the real agreement between the parties; and also to compel the testator to account for, and pay to the Plaintiff, the value of certain personal property alleged by the Plaintiff to have been wrongfully taken by the testator, claiming to act by virtue of said mortgage, and to have been by him converted to his own use.

The issues joined were tried at Special Term before one of the Justices of the Supreme Court, who found most of the issues of fact in favor of the Plaintiff, and ordered judgment in

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Splitting cause of action. 11 *Hun,* 158; 34 *Misc.* 184 (68 *N. Y. Supp.* 861); 9 *St. Rep.* 535.

Defense—Pendency of action. 38 *App. Div.* 375 (56 *N. Y. Supp.* 727).

Appeal—Review of facts. 43 *N. Y.* 80; 48 *N. Y.* 369; 51 *N. Y.* 355; 47 *How. Pr.* 177; 18 *Misc.* 23 (75 *St. Rep.* 495; 41 *N. Y. Supp.* 39); 5 *Daly,* 400.

her favor enjoining the Defendant from prosecuting any action against the Plaintiff for the recovery of rent upon the leases, and ordering the same cancelled, and also for the reformation of the chattel mortgage in several particulars, and also judgment against the testator for about five thousand dollars on account of the personal property of the Plaintiff taken and converted by the testator. After the entry of judgment the testator appealed therefrom to the General Term of the Supreme Court, by which the judgment was reversed and a new trial ordered, from which order the Plaintiff appealed to this Court.

The facts upon which the legal question arises will be found in the opinion.

Truman Smith for Appellant.
S. B. H. Judah for Respondent.

GROVER, J.—The facts found by the Judge at Special Term warrant the legal conclusions deduced, and the judgment ordered. These facts are not open to review in this Court, where there is any evidence sustaining the finding, unless it appears from the order directing a new trial that it was granted upon questions of fact and law. That does not appear in the order in the present case.

This Court can therefore only examine the case for the purpose of determining whether the Defendant's testator was entitled to a new trial by reason of any legal error committed upon the trial at Special Term to his prejudice. Among the defences to the action interposed by the answer was, that an action for the same cause had been prosecuted by the Plaintiff against the Defendant in the Superior Court of the city of New York; that the cause had been tried, and the same matters had been submitted to and passed upon by the jury, and a verdict rendered upon which judgment had been entered, which was still pending upon appeal from the judgment. The Special Term found against the Defendant upon this issue, to which finding the Defendant excepted. There was no conflict in the evidence upon this issue.

That consisted of the summons, complaint, and answer in

the case in the Superior Court, the evidence given upon the trial, the verdict, and the judgment rendered thereon. All this evidence was received without objection, and must be regarded as proper to prove any material fact upon the trial of the present action, so far as it tended to establish such fact.

From this evidence it appeared that the action was brought in the Superior Court for the breaikng and entering the close of the Plaintiff (the premises embraced in the leases from the testator and others to Earle), and taking and converting the goods of the Plaintiff (the identical furniture for the taking of which a recovery was sought in the present suit); that the taking was proved in the former suit, and that it was identical with that proved in the present suit; in short, that substantially the same evidence, so far as the furniture and goods were concerned, was given in both actions.

It is now insisted that the evidence of the former action, trial, and judgment was not admissible under the answer in the present action, for the reason that the answer alleged that the whole of the present action was the same as that in the Superior Court, when in fact that action embraced only a portion of the subject-matter of the present; that is, the claim for the furniture. It is a sufficient answer to this objection, if any is required, that no such objection was taken upon the trial. It is further insisted that the defense is not available in the present action, for the reason that this is a suit in equity to recover damages against the Defendant for depriving her wrongfully of her equity of redemption in the property, while that in the Superior Court was to recover damages for the wrongful taking thereof.

This argument would be conclusive if the facts were such that no recovery could be had for the taking of the property by the Defendant in the action in the Superior Court, or for the conversion of the same by him. I can see no absolute objection to such recovery upon the facts found by the Judge at Special Term. From that finding it appears that, by the agreement given by the testator to the Plaintiff ratifying his right under the mortgage, the Plaintiff had the exclusive right to the

possession of the property unless more than six hundred dollars rent, to secure which the mortgage was given, was in arrear, or unless some other mortgage upon the property was about to be foreclosed; and it is further found that no more than six hundred dollars rent was in arrear at the time of the taking, and that the proceedings to foreclose the mortgage given by the Plaintiff to Jarvis, were taken by the procurement of the Defendant, and were in substance his proceedings.

Under this state of facts the Plaintiff was entitled to recover all her damages for the taking and sale of the furniture by the Defendant, in the action in the Superior Court. No reformation of the chattel mortgage was necessary for this purpose.

The mortgage, in conection with the agreement of the Defendant, was sufficient for the purpose. Indeed, upon the facts found by the Judge in the present case, an action at law was the appropriate remedy to redress the injury of the Plaintiff so far as the furniture was concerned. The Plaintiff not only had an equity of redemption in the property, but also the exclusive right of possession at the time it was taken and sold by the Defendant. Had she proved the facts found in the present case upon the trial in the Superior Court, she would have entitled herself to a verdict for all the damages sustained by these acts of the Defendant. Hence it follows that the defense based upon that trial and judgment is not answered by the argument that the Plaintiff could only obtain redress in equity, and that she failed to recover for the furniture in the action in the Superior Court for that reason.

It is further insisted by the Plaintiff's counsel: That it appears, from the Judge's charge to the jury, that the entire claim of the Plaintiff for damages founded upon the taking and conversion of the furniture was withdrawn from the con- wholly for entering upon and depriving the Plaintiff of the sideration of the jury, and that the damages recovered were possession of the real estate.

An examination of the charge will show that in this the counsel is mistaken. Various questions relating to the Plaintiff's right to recover for the furniture were submitted by the

Judge to the jury, and the Judge charged the jury that the Plaintiff was entitled to recover damages for the detention of that portion of the furniture by her afterwards sold to Mathews, from the time of the taking to the time of the sale to Mathews.

The furniture was all taken at one time by the Defendant. The trespass was one entire act. The claim of the Plaintiff could not be divided, and separate actions maintained therefor. A recovery in an action for any portion of the damages would bar the entire claim (Farrington *v.* Payne, 15 Johns. 432, and cases cited). It is obviously immaterial how much, if anything was allowed by the jury. The bar arises from the fact that the claim has been submitted to, and passed upon by, the jury. There was therefore no evidence to warrant the finding of the Judge in the present case, that the Plaintiff's claim for damages arising out of the taking and sale of the furniture, was not barred by the judgment in the action in the Superior Court. On the contrary, the undisputed evidence required a finding that it was so barred. The Defendant's exception to this finding presents its correctness as a question of law.

Whenever a question of fact is found by a judge or referee contrary to what the undisputed evidence requires, a legal error is committed that may be corrected upon appeal by this Court. The Supreme Court were right in reversing the judgment and ordering a new trial upon this erroneous finding.

It may well be doubted whether the Plaintiff had not, by bringing the action against the Defendant in the Superior Court, and prosecuting the same to judgment after knowing that the writings as executed were not conformable to the real agreement of the parties, precluded herself from maintaining an action for reforming them. (See Sanger *v.* Wood, 3 Johns. Chan. 416; Rogers *v.* Vosburgh, 4 id. 84.) But it is not necessary to pass upon this point. The order appealed from must be affirmed.

All affirm, except WOODRUFF not voting.

JOEL TIFFANY,
State Reporter.

JOHN G. SPEAIGHTS AND OTHERS, EXECUTORS, &C., OF JOHN G. DUDLEY, DECEASED, RESPONDENT, v. J. DEAN HAWLEY, APPELLANT.

Vendor—Chattel Mortgage—Possession of Mortgagor after default—Sale to third person—Liability to Mortgagee.

Where the mortgagor of chattels, in possession thereof after default in the payment of the mortgage debt, fraudulently delivered them to a third person for sale, representing that they were his property, and the third person, as agent for the mortgagor, sells the chattels, such third person is liable to the mortgagee for the value thereof, nothwithstanding he acted in good faith, believing that the chattels were the property of the mortgagor, and paid the proceeds of the sale which he made, to the mortgagor, without reward for his services. The agent in a fraudulent disposition of the property of another, not being money nor negotiable paper, is liable therefor to owner, although he act in good faith, without interest or reward, and in the belief that his principal is the owner.

Mere possession of personal property is not such an indicium of ownership or warrant to dispose of, as will protect a bona fide purchaser for value.

He who assumes to deal or intermeddle with chattels not his own, must see to it that he has a warrant therefor from the owner, or from one who has authority from the owner to confer such warrant.

The mere continuance of the mortgagor in the possession after default in the payment of the mortgage debt, is not enough.

APPEAL from an order of the Supreme Court in General Term in the Fifth District, reversing a judgment for the Defendant, entered on the report of a referee, and awarding a new trial.

The action was brought to recover damages alleged to have been sustained by the Plaintiff by reason of a sale by the Defendant of a set of diamond earrings and a diamond pin, which had been mortgaged to the Plaintiff by Charles Ashby and Eugenia his wife, on the 25th of August, 1859, to secure the payment of six hundred dollars, due to him from the said Charles Ashby.

The answer admits the sale by the Defendant, and avers that the jewelry was sold by him as the agent for Mrs. Eugenia Ashby, and was her property (to wit, her personal jewels and

ornaments), placed in Defendant's hands for sale for the said Eugenia by Charles Ashby her husband, and that he made such sale in good faith for the said Eugenia, without any notice that the Plaintiff had any mortgage or claim upon the property, and that the Defendant never had or claimed any property or interest therein, or in the proceeds thereof.

The facts found by the Referee are, that Charles Ashby was indebted to the Plaintiff in the sum of $600, and on the 25th of August he and his wife mortgaged the jewelry in question (it being the property of the wife), to secure to the Plaintiff payment of the debt in one year from the date. That the jewelry remained in the possession of the mortgagor, but the mortgage was duly filed in the office of the County Clerk, and a copy was also filed before the expiration of the year, with due endorsement of the amount due.

That in March, 1861 (about seven months after the mortgage had become payable), the Plaintiff commenced an action to foreclose the right of redemption, which action was tried before a Referee, who reported in May, 1862, in favor of the Plaintiff, but judgment therefor has not been entered. Pending that action, and in March prior to the report, Ashby took the jewelry to the Defendant, a dealer in watches and jewelry in Syracuse, represented that it belonged to his wife, offered to sell it to the Defendant, and finally agreed that the Defendant should send it to New York and sell it. The Defendant sent the jewelry to New York and effected a sale there for $200, which was the best price he could obtain. He received the proceeds of sale, and paid them to Ashby without charge for his services. He acted simply as the agent of Ashby or Ashby and wife, without notice of the mortgage or title of the Plaintiff, in good faith.

The value of the jewelry, the referee finds, was three hundred dollars.

The conclusions of the Referee, stated as conclusions of law, are that the title of the jewelry was in the Plaintiff; that he does not doubt the good faith of the mortgage, although the prop-

erty was left in the possession of the mortgagors—but that, as the Defendant is neither creditor nor a purchaser, the question of fraud in the mortgage does not arise; that the mortgagors were guilty of converting the diamonds, and what the Defendant did, he did as their agent, and at their request; but that, by the continuance of the property in the possession of the mortgagors, Ashby or his wife was suffered to continue the apparent owner, and enabled to commit the wrong complained of; that the Defendant was an innocent party who relied upon such apparent ownership; he acted as agent merely, in the general line of his business, and made no profit by the transaction. As he was not a creditor nor a purchaser, so he is in no manner affected by the filing of the mortgage; that the lack of notice repels any presumption of fraud.

That, upon the facts stated, it is not just that the Plaintiff should recover, and such is not the law.

From the judgment for the Defendant, entered upon this report, the Plaintiff appealed to the General Term of the Supreme Court. The judgment being there reversed, and a new trial ordered, the Defendant stipulated, and appealed to this Court.

Geo. F. Comstock for Appellant.
R. Woodworth for the Respondent.

WOODRUFF, J.—The facts in this case show title in the Plaintiff to the property in question, and a disposition thereof by the Defendant, avowedly and solely as agent for Eugenia Ashby, the owner and one of the mortgagors.

The Defendant's answer avers that he acted as such agent without any interest or claim of interest in the same or its proceeds. The referee finds as a fact that he acted simply as the agent of Charles Ashby or of Charles Ashby and his said wife.

The title of the Plaintiff was valid both upon the facts found and upon the legal conclusions stated by the referee. It follows that the disposition of the property by Ashby and wife was a tortious conversion thereof, and so the referee finds.

No question of fraud in the mortgage to the Plaintiff or

otherwise, nor any failure to place his mortgage on file pursuant to the statute, was decided by the referee or by the Supreme Court, nor claimed by the counsel for the Appellant, to arise in the case, because as against the mortgagors and their mere agent the bona fides of the mortgage and the filing thereof were regarded as wholly immaterial, and as against them, the mortgage was held valid, even though made to defraud creditors, and whether filed or not. It is, however, satisfactory to say, that both good faith and due filing and renewal of the mortgage are facts in the case duly proved and found.

The case, therefore, raises the single question whether the possession of the mortgagors is such evidence of ownership or of authority to make sale of the property, that the Defendant, acting in good faith as their agent in the belief that they were owners, is protected thereby against the claim of the Plaintiff to recover for a sale and disposition therof. Some stress was laid upon the fact that this transaction was more than a year after the mortgage debt became payable, and the continued possession of the mortgagors during that time is claimed to be laches on the part of the Plaintiff, warranting the Defendant in trusting to their apparent ownership, and executing their direction to sell the property.

The reasoning sought to be applied to this, seems to me to overlook the fact found by the Referee, that for more than a year of the period the Plaintiff had been in the actual prosecution of an action to enforce his rights against the mortgagors, and the further circumstance that the Defendant is in nowise shown to have been affected by or to have had any knowledge whether the mortgagors had been in the possession of the property one year or one day; he was not misled into any trusting to a long continued possession, for it does not appear that he ever saw or heard of the property until the day on which it was brought to him for sale.

I do not, however, attach importance to this, for I am not aware of any principle or any authority which makes such mere possession, in the absence of fraud, amount to a justification of

the agent in a fraudulent disposition of the property. It is placed by the Appellant upon some general idea that, because the mortgagors had possession and the Defendant honestly believed they were owners, and in that belief, innocent of any wrongful intent, sold the property and paid over the proceeds, it is not just that he should be held responsible. In other words, it is as to the Defendant a hard case.

Now all this would be very well, if it were true that mere possession of personal property was such evidence of ownership or of authority to dispose thereof, that all persons were at liberty to assume such ownership or authority, and act in reliance thereon. Unfortunately for the Appellant, this is not so. Indeed, the cases in which possession imports such authority are very few, and the mere fact of possession, unaccompanied by other circumstances giving it a specific character indicative of authority, never does.

Indeed, any consideration which is urged for the protection of the Defendant would have appealed as strongly in his behalf, if it had appeared that Ashby had stolen the property from the Plaintiff. Ashby's possession would have borne the same aspect of apparent ownership, and the Defendant's sincere good faith and innocence of wrong would have been equally of consideration. True, in such case the possession of Ashby would have been against the will of the Plaintiff; but even then, why should it not be said that the Plaintiff should have taken care that his property be not stolen, and not suffer the innocent Defendant to become a sufferer? But take a stronger case: Suppose the property had been loaned by the Plaintiff to Ashby—it would not in that case be claimed, any more than if stolen by the latter, that Ashby's possession would protect the Defendant, and yet the hardship of holding him responsible would be, in all respects, the same as in this case. I concede that it is hard, in one sense, that the Defendant should be compelled to indemnify the Plaintiff; it is so, because it is not easy always to be perfectly safe in one's dealings.

But chattels are not negotiable; possession is not, as in the

case of mercantile paper and money, assurance of title or of authority to dispose of. The servant entrusted with the possession of his master's porperty does not thereby gain authority tc sell it, or to authorize another to sell it; the borrower of a chattel or the ordinary bailor does not by his possession gain any such power; and, in short, the rule that no one can be deprived of his title without his own consent, has no such exception as is sought to be created in this case; and the converse rule, that he who assumes property which is not his own must see to it that he has a warrant therefor from some one who is authorized to give it, has no such qualification (Anderson v. Nicholas, 5 Bosw. 121, and cases cited.) If he buys from or consents to act by direction of another, he must see to it that in the responsibility of such other he can find indemnity if his confidence is misplaced.

All there is, therefore, of hardship to the Defendant is, that he has undertaken to execute a commission for Ashby, or Ashby and wife; and if, in consequence of acting upon fraud or misrepresentation, he is subject to liability to the Plaintiff, he will have to look to them for indemnity. Perhaps the finding of the Referee indicates that Ashby is insolvent—if so, that makes the hardship; but even that is not a peculiar case, it is most common in the affairs of business, and having, as the referee finds, heard that Ashby was insolvent when he undertook the commission, he might have known that his recourse to him for indemnity might fail.

The doctrine of the cases cited in the prevailing opinion in the Supreme Court does not appear to be contradicted by the counsel for the Appellant; and yet they seem to me decisive, in this case, of the principle that the agent, in a tortious conversion of another's property, is liable where his principal is guilty of the tort, and even though the agent act innocently, in good faith, relying on the possession and apparent authority (if possession be deemed such) of his principal. Perkins *v.* Smith (1 Wils. 328), an innocent clerk sold goods for the use of his master; Stephens *v.* Elwall (4 Maule & S. 259), an innocent

clerk received goods from his master's agent, and sent them to his master abroad. In this case the observation of Lord Ellenborough covers this whole case. The only question is, whether this is a conversion in the clerk which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it.

McCombie *v.* Davies (6 East, 537); Baldwin *v.* Cole (6 Mod. 212); Thorp *v.* Burling (11 John. 285); Farrar *v.* Chauffetete (5 Denio, 527); Pearson *v.* Graham (4 Ad. & Ell. 899); Everett *v.* Coffin (6 Wend. 603); Williams *v.* Merle (11 Wend. 80), and these cases recognize and affirm the more general rule above stated, that he who intermeddles with personal property not his own must see to it that he is protected by the authority of one who is himself, by ownership or otherwise, clothed with the authority he attempts to confer. Recurring again to the able and ingenious argument in support of the appeal, and to the point that the Plaintiff was guilty of laches, and that, by suffering the mortgagors to be in possession, he enabled them to deceive the Defendant and produce the result—this asumes that it is negligence in the owner of personal property to permit it to be in the possession of another.

I am not aware of any warrant for such assumption, so long as it is true that a mortgage given in good faith, and for sufficient consideration, is valid, notwithstanding possession may be in the mortgagor, so long as such possession no more involves culpable negligence or laches in the mortgagee than possession of a servant, hiree, or other bailee, imports negligence in the owner. In truth, so long as mere possession does not import authority to sell, the negligence, if any, is on the part of him who relies upon it, and not on the owner who permits it; and the suggestion gains no strength from the observation, that

if the Plaintiff had not suffered the mortgagors to be in possession, it would not have been in their power to deceive the Defendant; and where one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must bear the consequences.

How did the mere possession of the mortgagors enable them to commit the wrong? Only by giving them physical power to deliver the property. The maxim is not true in the sense in which it is sought to be here applied. If it were, then, as in the other cases above referred to, whenever an owner suffers his property to go out of his manual keeping or presence, he is liable to lose it by the same means employed here, and is exposed to the maxim here invoked for the Defendant's protection. It is only where the owner has parted with the legal title upon some secret trust or condition, or has done something calculated to mislead, upon which a third person has a right to rely, and on which he does rely, as evidence of authority, that such maxim could have any application, and the attempt to apply it here begs the whole question (see Cowen, J., in Ash *v.* Putnam, 1 Hill, 302). Mere possession of another's property is not such evidence of ownership or authority to sell, that third persons have a right, as against the true owner, to rely thereon. They may act in faith thereof if they please, but they must rely upon the party with whom they deal, and look to him for indemnity if the title fails, or they be deceived or defrauded into a condition of responsibility. This is the Defendant's situation; he has trusted the representations of Ashby; he has been deceived thereby, and he must look to him for indemnity.

The order of the General Term of the Supreme Court granting a new trial should be affirmed, and in pursuance of the Defendant's stipulation, judgment absolute for the Plaintiff must be rendered.

All concur.

Order of General Term affirmed, and judgment absolute for the Plaintiff, with costs.

JOEL TIFFANY,
State Reporter.

BLYDENBURGH, EXECUTOR, &c., v. JOHNSON.

Res adjudicata—Question of fact.

CLERKE, J.—The legal questions involved in the agreement made between the Defendant and Richard F. Blydenburgh, the testator, of whose last will and testament the Plaintiff is executor, have been settled in various actions in this Court.

The questions of fact the Referee has decided in favor of the Plaintiff.

The exceptions taken to the admissibility of evidence are plainly untenable, as is the whole defence from the beginning to the end.

Judgment should be affirmed with costs.

JOEL TIFFANY,
State Reporter.

FANNY WILCOX, ADMINISTRATRIX, &c., OF JOHN WILCOX, DECEASED, v. THE ROME, WATERTOWN, AND OGDENSBURGH RAILROAD COMPANY.

Contributory Negligence—Failure of deceased to look and to listen for train.

It is negligence bordering upon rashness for a person to walk upon a railroad track without availing himself both of his sight and hearing, to ascertain the approach of a train of cars from behind as well as in front; and when the deceased has been guilty of such negligence, the company will not be liable for injuries received, when they might have been avoided by the exercise on the part of the deceased of such ordinary caution.

APPEAL from judgment of General Term of Fifth District.

Court Street is one of the principal thoroughfares leading into the village of Watertown, from the country to the public square and business centre of the town. The Defendant's road crosses the street at right angles, near the bridge across the Black River. There are two depots in the village; one in the neighborhood of half a mile above the crossing in the rear of the Woodruff House, and the other about the same distance below. They are known as the upper and lower depots. The crossing is about half-way between the two depots.

The action was brought to recover damages for the negligence of the Defendant, in causing the death of the Plaintiff's intestate. It was tried at the Jefferson County Circuit. The Plaintiff's intestate was passing in front of a crossing in De-

Railways—Negligence—Crossings. 38 *N. Y.* 442; 40 *N. Y.* 22; 41 *N. Y.* 299, 503; 42 *N. Y.* 473; 54 *N. Y.* 471; 59 *N. Y.* 472; 64 *N. Y.* 529, 656; 75 *N. Y.* 278; 2 *Hun,* 538; 92 *Hun.* 566 (72 *St. Rep.* 327; 36 *N. Y. Supp.* 944); 55 *App. Div.* 31 (66 *St. Rep.* 1078); *D.* 55 *App. Div.* 37 (66 *N. Y. Sup.* 1082); 56 *App. Div.* 512 (57 *N. Y. Supp.* 361); 2 *T. & C.* 6; 5 *T. & C.* 125; 6 *T. & C.* 417.

Negligence—Contributory—nonsuit. 14 *Abb. N. S.* 76; 39 *How. Pr.* 414; 50 *Super. Ct.* 506; 11 *St. Rep.* 836.

fendant's road, on or near the place where it crosses Court Street. In passing down the track from the Woodruff House, the Court Street crossing is in perfectly plain sight for some seventy or eighty rods, so that a person on or near the crossing could see distinctly for that distance, there being nothing whatever to obstruct the view. The deceased, at the time of the accident, had been at a lime-kiln near there, for a pail of mortar. He left the lime-kiln, along the path leading up and west, along the track, toward Court Street, on his way home, where he and his family had resided for many years, near the lower depot.

The last that was seen of the deceased, until the instant the engine struck him, he was crossing the cattle-guard, at the south end of it, west of Court Street, where the path leaves the Court Street crossing. Engines in the business of the road are constantly running across it, and at all hours of the day and night, and night trains, regular trains, extra trains, and shifting trains are passing in along the track, night and day, to the depot. It came around the curve down to and across the Court Street crossing at a speed of from twelve to fifteen miles an hour.

There was evidence to show that the whistle was not sounded nor the bell rung as it approached the crossings there. The testimony was conflicting as to the ringing of the bell and sounding of the whistle, the Plaintiff's witnesses swearing that they did not hear it although near by, and the Defendant's testifying that the bell was rung and the whistle sounded. About twenty feet from the ditch, or cattle-guard, it struck the deceased, and he died in about thirty-six hours. The engine came up behind him, and carried him some forty-five feet from where it struck him. He was, when struck, some twenty-five feet in side of the west line of the street or highway. A shifting engine was going in the opposite direction. The engineer, t fireman, and a boy who got upon the engine at the upper dep were on the engine at the time. There was no signal-man the crossing, and no watch or lookout was kept by those on

engine, to see whether the crossing was clear. The deceased could have been seen from the engine perfectly plain for some sixty or eighty rods, had a lookout been kept.

The engineer was on the opposite side of the engine, in a place where, as he swore, he could not see the tract six feet ahead of the engine; but on the other side of the engine the deceased would have been in plain view. The fireman had left his place, and went to piling wood in the tender. The boy had nothing to do with the engine, having merely jumped on for a ride between the depots. When the engine struck the deceased, he was within the bounds of the street or highway.

At the close of the Defendant's argument the Defendant's counsel moved for a nonsuit, on the ground that the deceased was guilty of negligence, which was refused, and exceptions taken. Some other questions were raised, not material to be stated.

The jury found a verdict for the Plaintiff, and on appeal, judgment was affirmed at General Term, and the Defendant appealed to this Court.

S. T. Fairchild for Appellant.
Hammond, Winslow & Willams for Respondent.

MILLER, J.—The main question which we are to determine in this case is, whether the deceased was guilty of negligence, which contributed to the injury that caused his death.

At the time when the occurrence took place, he was in the public highway, where he had a perfect right to be, for the purpose of travelling, or of crossing the track. He was familiar with the locality, having lived for some time in the neighborhood, and probably was acquainted with the times for the running of the trains. It was not the time for any regular train to pass, but engines and trains were passing at all times of the day and night. The engine was running at a speed of fifteen miles an hour, and another engine, called a shifting engine, had gone in an opposite direction to the one which ran on the deceased, of which fact the deceased must have been advised.

The evidence does not show whether the deceased, before attempting to cross, looked up and down the track to ascertain whether a train was coming, but it appears the engine or train was in plain sight, as he could see for a distance of seventy or eighty rods. It is a fair and reasonable presumption, arising from all the circumstances attending the transaction, that he did not look, for, had he done so, he must have seen the engine approaching, and his life would have been saved. I think, therefore, that we must assume that he did not look, and in failing to do so, he neglected a plain and imperative duty, and was guilty of negligence which precludes a recovery.

A traveller, in crossing a railroad track, is bound to exercise at least ordinary sense, prudence, and capacity, and this requires that he should use his ears and eyes, so far as he has opportunity to do so. None of the cases adjudicated exonerate him from thus employing his faculties; and those which are relied upon as sustaining a contrary doctrine are exceptional, and present more strong and controlling facts, which prevented the party from hearing or seeing the train, so far as I am able to discover. The later cases, which are supposed to uphold the doctrine that a party is exonerated from the charge of negligence who does not look, only go to the extent of holding that a party is not in law guilty of negligence in not seeing the approaching train when crossing a railroad track, when circumstances existed which tended to show that the sight was obstructed, or to render it at least doubtful whether the party was in fault, so that it was proper for the jury to pass upon the question of negligence.

In examining all the cases bearing upon the question, I refer briefly to a few recent cases, which are considered as applicable and decisive. In Brown v. The N. Y. Central R. R. Co. (32 N. Y. 597) a train had passed, and the Plaintiff had stopped for it. A single car had followed at a distance, and he had waited for that. Others followed which were not anticipated, and of which the Plaintiff had no notice or warning. It was held that he was not guilty of negligence, in the eye of the law,

in not anticipating the detached cars which followed in the rear of the train that had passed.

In Stillwell v. The N. Y. Central R. R. Co. (34 N. Y. 29) the same facts existed as in the case last cited, and the same rule was applied.

In Beisiegal v. The N. Y. R. R. Co. (Id. 622) there were freight cars on one of the tracks, which interrupted the Plaintiff's vision, and prevented his seeing the engine approaching, and it was held that he was in law not guilty of negligence.

In Ernst v. The Hudson R. R. R. Co. (35 N. Y. 9) it was doubtful whether the deceased did not look up and down the track as far as he could see, and whether if he had done so he could have seen the approaching train; and also whether he was not misled by the failure to show the flag, in accordance with previous custom. It was conceded that the question of negligence of the deceased was for the jury.

It will be seen that some of the authorities cited present a case where the person injured or killed had a full opportunity to see the train as it was running along, and that there were obstructions to the view which is not the case here.

It is said that the deceased had no occasion to look behind him, as the engine from which he might reasonably expect danger at the time was in an opposite direction, that he attention would naturally be directed there, and that it was not within an hour for any regular train to pass.

There was evidence to show that trains were passing without regard to the time-table, and every one conversant with the operation of railroads is aware that extra trains are often run out of the usual order, and without regard to regularity, so as to render it unsafe to pass a crossing during the day-time without taking an observation to see whether a train is then likely to pass.

It was remarked by Denio, J., in Wilds v. The H. R. R. R. Co. (29 N. Y. 315): "No one can be secure against being met by an engine, except by ascertaining by his own senses that no train is approaching, in either direction, within a distance

which will endanger his safety." There is much force in this suggestion; and it would, in my opinion, present a very imperfect and unsafe protection to a traveller to act only upon his knowledge of the timetable, or upon the fact that an unusual train had passed in an opposite direction, and therefore none other could be expected. The reason urged, I think, furnishes no sufficient excuse for the failure of deceased to use his faculties, and for neglecting to exercise a proper degree of vigilence and care.

It is said that as no bell was rung or whistle sounded, the deceased was not negligent in not hearing the train as it came near the crossing. The testimony on this subject was conflicting, and we must therefore assume that these signals were not given. Does that admission relieve the deceased from the charge of negligence, which contributed to produce the disastrous result which followed?

In Ernst *v.* The H. R. R. R. Co. (35 N. Y. 9), before cited, the opinion of one of the Judges holds, that the omission of the customary signals is a breach of duty, and an assurance to the traveller that no engine is approaching from either side within eighty rods of the crossing, and that he may rely on such assurance without incurring the imputation of a breach of duty to a wrong-doer. Upon trial of the case a verdict was rendered in favor of the Plaintiff, and on an appeal to this Court the judgment was affirmed. Several of the Judges placed their decisions upon other and different grounds than the failure to give the necessary signals, and I do not understand that a majority of the Court held that such neglect was an assurance of safety which relieved the wayfarer, who did not look, from the imputation of negligence.

In Beisiegal *v.* The N. Y. Central R. R. Co. (34 N. Y. 622) the same doctrine is substantially reiterated, in one of the opinions, which was laid down in the Ernst case, but the case was not decided entirely upon any such ground. The Judge who wrote the opinion concedes "that it is the duty of a person who is about to cross a railroad track to make an observation before

crossing;" but he considers him relieved from the charge of negligence when the vision is constantly obstructed by intervening obstacles, where it is often very difficult to see up and down the railroad track. He also assumed that "when a man on foot reaches a point near the crossing, and listens and hears no signal or warning, he is not guilty of negligence for attempting to cross the track in a case where he cannot see up and down, by reason of obstruction.

As we have already seen, the decision of each of these cases depended very much upon the fact that the vision of the person killed or injured was obstructed by surrounding objects, and hence they cannot be regarded as settling definitely the principle, that the neglect as to the signal required creates an exemption from liability where he fails to look, and has the means of seeing if he does thus look.

In Sheffield v. The R. & S. R. R. Co. (21 Barb. 339) the Plaintiff was in plain sight of the track, with nothing to obstruct his view; and it was held that it was inexcusable negligence which contributed to the injury which precluded a recovery. There was evidence on both sides as to the ringing of the bell; but the verdict being in favor of the Plaintiff, it settled the question that no signal was given.

In Brooks v. The Buffalo & Niagara Falls R. R. Co. (25 Barb. 600) it was assumed that no bell was rung, and decided that a person who crosses a railroad track in ignorance of the approach of a train, when the danger may be easily seen by looking for it, is fairly chargeable with negligence. This case was affirmed on appeal to this Court, and it was held, that an attempt to cross a railroad track without looking up and down to see if a train is approaching, is such an act as a man of ordinery prudence would hardly be guilty of. (See 27 Barb. 532, note.)

In Dascomb v. The Buffalo & State Line R. R. Co. (27 Barb. 221) it was held, that to authorize a recovery against a railroad company for damages sustained by reason of the neglect of the agents to ring a bell or sound a whistle, that it

must appear that such neglect was the sole cause of the damage; and if the Plaintiff was himself guilty of negligence which contributed to the injury, he cannot recover, notwithstanding this omission of duty by the company.

In Mackey *v.* The N. Y. C. R. R. Co. (27 Barb. 528), although the fact whether a signal was given was in doubt, the jury found against the defendant, and a new trial was granted on account of the Plaintiff's negligence.

In Steves *v.* The Oswego & Syracuse R. R. Co. (18 N. Y. 422), this Court held that it was not enough to enable the Plaintiff to recover, that he established that the Defendant neither rang the bell nor sounded the whistle, when the Plaintiff himself was guilty of negligence in not seeing or hearing the cars; and a nonsuit on the trial was sustained.

In Mackey *v.* The N. Y. C. R. R. Co. (35 N. Y. 75) the liability of the Defendant was put upon the ground that the company had obstructed the view of travelers on the public highway, by piling wood, so that the approach of a train could not be seen at the crossing until the traveller was on the track.

In Renwick *v.* The N. Y. C. R. R. Co. (36 N. Y. 132) it appeared that the Plaintiff had stopped and listened from four to six rods from the track, and hearing no signal, and seeing no indication that the train was approaching, he started his horses and continued looking until he reached the track, and then turning his eyes to the right, found a train upon him; and the judgment for the Plaintiff was upheld.

The effect of the cases cited is to sustain the principle, that when the negligence of the party injured or killed contributed to produce the result, he cannot recover, and that the omission of the company to ring the bell or sound the whistle, near the crossing of a highway, does not relieve the person who is about to pass over the highway from the obligation of employing his senses of hearing and seeing, to ascertain whether a train is approaching. They are entirely applicable to the case before us,, and in the absence of any authority which holds a contrary

doctrine, where the naked question is presented which now arises, I think they are decisive and controlling.

It is very plain that the deceased could have seen the approaching train had he looked in that direction. There were no obstructions to his vision, and no occasion to divert his attention, which excused him from observing. He recklessly and carelessly neglected to exercise that prudence and care which the circumstances demanded, and exposed himself needlessly and unnecessarily to danger and to certain death. His negligence was inexcusable, and as actions of this kind are founded upon the principle that the party claiming damages must not contribute to produce the injury, it is difficult to see how any negligence of the party inflicting the injury can obviate the difficulty.

To hold that a party is excused when he has been careless, because the other party has failed to give the accustomed signals, or for any other act of negligence on his part, strikes at the principle upon which such actions are based. Such a rule is not sustained by any of the adjudicated cases, and from the consideration I have bestowed upon this subject I am not prepared to uphold such a doctrine.

The motion for a nonsuit, in my judgment, was improperly overruled; and for this error the judgment should be reversed, and a new trial granted, with costs to abide the event.

GROVER, *J.*—The only question necessary to examine in the present case arises upon the exception taken by Defendant's counsel to the denial of his motion for a nonsuit.

This motion was made upon the following, among other grounds: That the intestate was guilty of negligence contributing to the injury received by him. It is unnecessary to consider any of the other grounds. The testimony relating to this was in no essential particular conflicting.

It was proved that in the daytime the deceased was walking upon or by the side of the track of the Defendant's road, in the village of Watertown, toward Court Street; that after he

had got within the bounds of the street, as settled by the verdict, and within about twenty feet of the travelled portion thereof, he was struck by an engine running upon the Defendant's road, at the rate of twelve or fifteen miles per hour, in the same direction the deceased was walking, and received thereby an injury causing his death; that this engine could have been seen by the deceased where he was walking, and when he was struck, for a distance of fifty or sixty rods, had he looked behind him along the track; that there was nothing to obstruct the view for that distance.

The only question in the case, therefore, necessary to consider is, whether it was negligence in the deceased to expose himself in that dangerous position, without even looking along the track, behind as well as before him, to see if there was a train approaching. That he did not look is established by the fact that if he had, he must have seen the train in ample time to have enabled him to step off from the track, and thus have avoided the danger, which he failed to do.

There was no explanation of the conduct of the deceased, no evidence of any other train in motion in the vicinity, or any other cause whatever assigned for diverting the attention of the deceased from his own safety.

Under such circumstances, to walk along or stand upon a railroad track, without availing himself of the sense of sight, as well as hearing ,to ascertain whether there was danger in such position, is not only negligence, but borders upon rashness. It is no answer to say that this engine was not moving at that point upon the time of any regular train. If the deceased was sufficiently acquainted with the business of the Defendant as to know the time the different trains and engines passed over the road, or portions of it, at other times—that it was necessary for them so to do, in order to avoid the regular trains—it would be the grossest carelessness for one to place himself upon the track, without at all attending to his safety, relying upon the fact that it was not the time for the regular train to pass over that portion. That this negligence of the

Defendant contributed to his injury, is manifest from the fact, that had he not been guilty of it, he would have known of the approach of the engine, and have avoided the collision by stepping off the track. If the deceased had ordinary hearing, it is almost inconceivable that he failed to hear the train, whether or not the bell was run, in season to have avoided the danger, unless his attention was thoroughly engrossed by something foreign to his own safety in the position in which he had placed himself.

He certainly could not have been relying upon any assurance of the Defendant that no train was approaching, from their failure to ring the bell, for the reason that had he listened enough to make sure that no bell was ringing within eighty rods behind him, he must have heard the noise of the engine in season to have avoided the danger by leaving the track. All the authorities agree that no recovery can be had when the negligence of the party injured has contributed to the injury. The cases have been so often reviewed that a repetition would be superfluous.

The Judge erred in not granting a nonsuit on the ground of the negligence of the deceased. The judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

Reversed, and new trial.

JOEL TIFFANY,
State Reporter.

BENJAMIN G. HITCHINGS, APPELLANT, *v.* ELLEN VAN BRUNT, ADMINISTRATRIX, RESPONDENT.

Contract—Attorney and Client—Compensation—Presumption.

A contract by which a large compensation is to be paid to the attorney by the client, on condition of success on an appeal which he advises, is to be scrutinized by the Court, and every presumption taken against the attorney.

In such case, if the attorney does not succeed on the appeal, he is to be deemed to be entitled to nothing.

Sam'l Hand for Appellant.
P. S. Crooke for Respondent.

BACON, J.—The agreement upon which this action is brought is one between an attorney and his client, providing for a large compensation upon the success of the former in conducting the cause, where the client was assured that the case was one which not only stood very strong for him, but in which he must succeed.

In considering such a transaction, it may not perhaps be necessary to go to the extreme length of some of the cases which hold that where a security is thus taken, the absolute presumption of unfairness arises wherever the relation of counsel and client exists (Evans *v.* Ellis, 5 Denio, 640; Howell *v.* Ransom, 11 Paige, 538); but it is proper to invoke the well-settled doctrine announced by this Court in Nesbit *v.* Lockman, 34 N. Y. 167, that the law looks upon such a transaction with great suspicion, that it will be regarded with jealousy and scrutinized with care, and that the presumption is against the propriety of the transaction.

Stipulation for judgment absolute. 54 *N. Y.* 125; 80 *N. Y.* 407; 78 *App. Div.* 47 (79 *N. Y. Supp.* 895).

Attorney and client—Agreements between—Construction. 2 *T. & C.* 546; 110 *App. Div.* 799 (97 *N. Y. Supp.* 202); 46 *How. Pr.* 433; 39 *Super. Ct.* 232; 9 *Daly,* 369; 45 *St. Rep.* 674 (18 *N. Y. Supp.* 583).

This rule it is manifestly just to take into account as applicable to the interpretation of the instrument in question. If the meaning is not transparently obvious—if it will admit of a construction favorable to the client, he is entitled to that construction, not only upon the ground above suggested, but upon the familiar principle that the construction of an instrument produced by one as the essential foundation of his cause of action, for this is to be taken most strongly contra præferentem.

Above most, if not all, other classes in the community, a lawyer, to whom important interests are intrusted, and in whom great confidence is reposed, should be careful not to expose himself to the imputation of exacting hard terms from, or taking advantage of either the necessity or ignorance of his client, to secure a benefit to himself.

Now, what did the agreement provide for? The Plaintiff, as the counsel for the Defendant, had contested the probate of the codicil of Elias Hubbard's will before the Surrogate, and been defeated. The client was persuaded into trying the experiment of an appeal to the Supreme Court, upon an assurance of success, and agreed to pay liberally for such a result. The instrument accordingly provided that such an appeal should be taken, and that Plaintiff was to attend to and argue the same, and in case of success, and the decision of the Surrogate was reversed by the Supreme Court, the compensation of the attorney was to be $1,000 in addition to such costs and allowances as might be granted by the Court. There was another clause in the agreement, that in case it should be necessary "to contest" the case in the Court of Appeals, the Plaintiff should have such further compensation as might be just, and a final provision that the Defendant was not to settle the case without the approval of the Plaintiff, and in case he did so settle, was to be immediately liable for the full compensation "as herein provided."

The construction of the main and important part of the instrument admits of no doubt. It provided for compensation upon a clearly-specified contingency, to wit, success on the

appeal to the Supreme Court. If the Plaintiff had succeeded in that appeal, he would have been entitled, as is remarked by the Judge in the Court below, to that sum, even if the case had been appealed by the unsuccessful party and the judgment of the Supreme Court had been reversed. But as he was not successful on the appeal, he was entitled to nothing under his agreement, which had performed its whole office the moment the Supreme Court made its decision upon that appeal.

The final clause in the agreement cannot be construed to revive the claim which had become defunct by reason of the failure of the event on the occurrence of which alone a right to demand, or a duty to pay, arose. The "full compensation" therein spoken of was the compensation "herein provided," that, is, provided for in the former part of the agreement, which was $1,000 in case of success in the Supreme Court. The clause was applicable by the clearest implication to the cause in the Supreme Court, and to a settlement which might be made while the case was still pending there and undetermined; and it ceased to be operative the moment the decision there was made, and the appeal had proved unsuccessful. I agree with the counsel for the Respondent, that the word "contest" in the second clause of the agreement was understood and intended by the parties to apply to the case of a possible contest arising upon an appeal by the parties who were upholding the codicil in case the Surrogate's decree should be reversed in the Supreme Court.

Both the Plaintiff and the Defendant obviously counted on success in that Court, and the contest in view was, as it seems to me, one against an adversary who should by a further appeal threaten to deprive them of the fruits of their anticipated victory. The agreement will admit of this construction without doing violence to its language, and in a case of this kind I think the Defendant is entitled to such an interpretation. The instrument did not contemplate an appeal to be prosecuted by the Plaintiff, on behalf of the Defendant, after he had been defeated in the Supreme Court. This was a state of things not within the expectation of the parties, and not provided for in the agreement.

The counsel of the Defendant was therefore right in asking the Judge upon the trial to charge:

1. That the compensation of $1,000 was only in case the Plaintiff succeeded in the Supreme Court; and

2. That the agreement in the latter clause, that in case of settlement by the Defendant she was to be immediately liable for full compensation as therein provided, meant such compensation as was specified in the agreement; viz., $1,000 in case the Plaintiff succeeded in the Supreme Court, and not otherwise. These requests were refused, and the Defendant's counsel excepted. The refusal thus to charge was, in my view, erroneous. For this error the judgment was in the Supreme Court reversed, and a new trial ordered, and that judgment should be affirmed.

In the judgment of the Supreme Court a qualification was annexed providing for an affirmance of the judgment rendered on the verdict, on the condition that the Plaintiff remitted all but $200 of the recovery; and the counsel for the Appellant now asks this Court, if we come to the conclusion that the order for a new trial was right, to give him the benefit of that condition here, and still allow judgment to stand for $200. I think the Plaintiff is too late to ask the benefit of this condition. He did not consent to the correction, but appealed to this Court, and on taking his appeal he stipulated that if the order should be affirmed, judgment absolute should be rendered against him. Lanman *v.* Lewiston Railroad Co., 18 N. Y. 493, holds explicitly that an appeal to this Court from an order granting a new trial, lies only where the party obtaining the verdict is content, if he cannot sustain it, to fail wholly, in his action or defence; and that, where the order is for a new trial, unless the Plaintiff will remit a part of his verdict, he cannot appeal and retain the benefit of the alternative judgment for a reduced amount. The order should be affirmed, and judgment absolute rendered for the Defendant, with costs.

All concur.

JOEL TIFFANY,
State Reporter.

WILLIAM F. BLYDENBURGH, EXECUTOR, APPELLANT, *v.* AMOS F. BINGHAM, GEORGE G. JOHNSON, AND DAVID H. DECKER, RESPONDENTS.

Principal and Surety—Judgment—Release of property of Principal

Where the principal debtor had transferred all his title to real estate before the docketing of the judgment against himself and security, a release of such estate from any supposed liens of the judgment by the judgment creditor, does not discharge the security from his liability as such.

THIS action was brought by the executor of Richard F. Blydenburgh, deceased, to exonerate the estate of the testator from the payment of a judgment docketed in Kings County against the Defendant Johnson and the testator, on a note made by the former and endorsed by the latter as security.

The relief was claimed upon the ground that the Defendant Decker, being the owner of the judgment, had released therefrom to the Defendant Bingham, certain real estate, consisting of six city lots in Brooklyn, which was subject to the lien, legal or equitable, of said judgment.

The facts, as found by the Court which tried the cause, are substantially as follows:

On the 14th day of February, 1857, the Defendant Johnson, for a valuable consideration, conveyed the premises above mentioned, by a quitclaim deed, to the Defendant Bingham, which conveyance was recorded in Kings County on the 26th day of March, 1858.

The judgment above mentioned was recovered by Emanuel Hoffman and Henry Schubert, for the sum of $558.20, on the 8th day of July, 1857, and was docketed in Kings County on the 11th day of the same month.

On the 19th day of January, 1861, the Defendant Johnson

Surety—Discharge. 155 *N. Y.* 200; 29 *Hun,* 135; 8 *App. Div.* 417 (75 *St. Rep.* 223; 40 *N. Y. Supp.* 835); 66 *Barb.* 271; 40 *Super. Ct.* 428; 41 *Super. Ct.* 243.

and his wife executed and delivered to the Defendant Bingham a warranty deed of said lots, for the expressed consideration of $1, and other good causes and considerations. On the 20th day of November, 1862, Hoffman and Schubert assigned their judgment to the Defendant Decker, for a valuable consideration, and on the 20th day of the same month released the six lots from the judgment.

And the Court further found that at the time of the docketing of the judgment, of the assignment thereof to Decker, and of the release of the lots therefrom to Bingham, the Defendant Johnson had no interest in said lots, but the same were the property of the Defendant Bingham; that at the time of the assignment of the judgment and the release of the lots, the Defendant Bingham was embarrassed, and owing the Defendant Decker a large sum of money, which the latter could not get, nor get secured, unless the six lots were released from the said judgment, and that for that reason he purchased the judgment and paid the face thereof for it, and then released the said lots, holding the judgment as collateral security for the debt due him from Bingham.

That the property released was encumbered for its full value aside from the said judgment, and that the said judgment is still due and unpaid, and is a lien upon the real estate of the said Richard F. Blydenburgh, deceased.

And the Judge found as a conclusion of law, that the said David H. Decker is the owner of the said judgment, and is entitled to hold the same as a lien against the real and personal estate of Richard F. Blydenburgh, deceased. Judgment was entered for the Defendants, which was affirmed at General Term, and from the judgment of affirmance the Plaintiff has appealed to this Court.

Geo. Miller for Appellant.
J. H. Hedley for Respondent.

DWIGHT, J.—The facts found by the Court below must be conclusive against the theory upon which the Plaintiff in his complaint based his claim for relief.

That theory is, that the six city lots in Brooklyn were subject to the lien of the judgment of Hoffman and Schubert, as the property, legal and equitable, of Johnson, the principal debtor, and that the release of those lots by the holder of the judgment, without the consent of the surety, Blydenburgh, discharged the latter from the obligation of his suretyship, and entitled him to a discharge of his estate from the judgment.

The conclusion no one will dispute if the premises be as stated. The difficulty is, that the findings below entirely negative those premises.

The conveyance by quitclaim from Johnson to Bingham was five months earlier than the docketing of the judgment, and though the deed was not recorded until some months later than the judgment, it is not claimed that the lien of the judgment had priority for that reason.

Some objections to the quitclaim deed were urged by the Appellants, both on the trial and on the argument, but no facts were shown which detract in any degree from its force and validity as a conveyance of all the interest of Johnson in the property. And upon this point the finding of the Court below must be held conclusive; viz., that at the time of the docketing of the judgment, and of the release of the lots, Johnson had no interest in them.

The subsequent deed of Johnson and wife may have been sought and obtained for the signature of the wife; but whatever its purpose, it conveyed nothing as to Johnson which had not previously been conveyed. Indeed, I do not understand the Appellant, as insisting upon the argument here, that the judgment was in fact a lien, either legal or equitable, upon the lots, but claiming that it was so far considered to be such, and was thus so far a cloud upon the title to the property that it gave the judgment creditors a position relative to that property which was worth something to the benefit of which the surety was entitled to be subrogated, and which could not be released without in some degree affecting his rights and remedies.

In support of this view of the matter, the Appellant urges

the facts found, that Decker could not get security for his debt from Bingham unless the lots should be released from the judgment, and that for that reason he was willing to pay, and that the judgment creditors in fact received the face of the judgment for the assignment of it. But these circumstances by no means establish the fact that the position of the judgment creditors relative to this property was of any real value.

Its advantage was almost supposititious and imaginary. If Johnson had no interest in the lots when the judgment was docketed, nor at any time thereafter, the existence of that judgment could affect the negotiation of the security offered by Bingham, only upon the mistaken supposition that it was a lien upon the property. Nor can it be said that the position of the judgment creditors relative to the property did in fact avail them the face of the judgment. That judgment must be supposed to have been perfectly good without reference to these lots. It was collectable from Blydenburgh, the surety, whose solvency was unquestioned. So that Decker got full value for his money in obtaining the judgments, without reference to the value of the lots, and after the release he held the judgment as collateral security for so much of the debt of Bingham.

It is quite clear in executing the release of the lots from the judgment in question, Decker released nothing which could have availed for its collection, and consequently that the remedies of the surety were in no manner affected by such release.

Counsel for the Appellant insisted with much earnestness that there was a possibility that Johnson might have had some interest in the lots, and that therefore the surety might have been prejudiced by their release from the judgment.

And he cited some authorities in point, to show that the question was not necessarily, "Has the surety in fact been prejudiced? but, has there been a change in the relations of the parties by which he may have been prejudiced?"

But here again, as before, the Appellant is concluded by the positive findings of the Court below, that Johnson had no in-

terest in the lots in question, a finding which negatives even the possibility referred to.

There was another finding in the case which is probably equally fatal to the Plaintiff's claim to relief; viz., that the property was already encumbered for its full value before the docketing of the judgment against Johnson; but it is unnecessary to inquire as to the effect of prior liens when it is found, as above, that the judgment against Johnson was not a lien at all.

The judgment appealed from should be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

HENRY VAN SCHAICK, EXECUTOR OF MYNDERT VAN SCHAICK, DECEASED, v. THE THIRD AVENUE RAILROAD COMPANY.

Lease to Trustee—Implied liabilities of Cestui que trust.

Where a lease was procured to be made of certain lots to V., to hold in trust for a certain partnership or an incorporated company, to succeed to said partnership upon an agreement that when the company should be incorporated the trustee should transfer the lease to it, and it would assume and perform all the covenants and the liabilities incurred by said trustee—*Held,* that said company when formed, having taken the assignment of said lease, &c., were liable themselves, and were bound to indemnify and save harmless said trustee.

THIS action was brought to enforce the performance of the covenants contained in a lease made by Myndert Van Schaick to Henry Van Schaick.

The Special Term gave judgment in favor of the Plaintiff, which upon appeal was affirmed by the General Term of the First District. The Defendants now appeal to this Court.

The following is a statement of the facts, and of the conclusions of law found by the Justice who tried the cause:

That the Plaintiff made and executed the lease of the premises described in the complaint, dated the 16th of August, 1853, to Henry Van Schaick, as stated in the complaint, in pursuance of an agreement for that purpose made with him by the Third Avenue Railroad Company, Association, or Partnership, hereinafter named.

That the said lease was made to the said Henry Van Schaick, in pursuance of a resolution of said association or partnership proposed on the 16th August, 1853, and passed the 17th August, 1853. This resolution is set forth in the opinion of the Court.

Contract to pay debt of another—Enforcement. 43 *N. Y.* 411; 46 *N. Y.* 460; 57 *N. Y.* 14, 469; 183 *N. Y.* 334; 11 *Hun,* 504; 20 *Hun,* 146; 43 *Hun,* 285 (26 *Week. Dig.* 115); 1 *T. & C.* 296; 93 *App. Div.* 174 (87 *N. Y. Supp.* 533); 9 *St. Rep.* 765.

And that the same was on account, and for the benefit of, and as trustee for the said Third Avenue Railroad Company, a partnership or unincorporated association then existing, with whom the agreement to lease the premises for the term had first been made, and which was the only party beneficially interested in the said agreement and lease, except the corporation to be formed to succeed them, as mentioned in said resolution, and in the declaration of trust made between the said Henry Van Schaick and the said association or partnership, dated August 17th, 1853, and in pursuance of said resolution, and hereinafter mentioned.

That all the persons interested in the said unincorporated association, except one, became and were copartners and stockholders in the corporation that succeeded to all the property, rights, duties, and obligations of the said association, and became and was its only successor, as was originally contemplated and agreed upon, and that each and all of the said corporators and stockholders, as well as the corporation itself, had notice of the agreement by which the said Henry Van Schaick became the trustee for the association and the corporation to be formed therefrom, and ratified and approved the same, and accepted the promises as held by the said Henry Van Schaick under said lease for their benefit.

That in consideration of the acceptance of the said lease by the said Third Avenue Railroad Company partnership, the said Plaintiff, at their request, cancelled and accepted the surrender of a lease he had made of the same premises to the firm of Dewey, Dingledien & Co., persons engaged in an omnibus line of stages, which was for the term of ten years, commencing at the same time, at the same annual rent, including payment of all taxes and assessments—the said Third Avenue Railroad Company having previously assumed all the obligations of that lease, and requested the Plaintiff to give them a new lease upon the same terms, with an additional period of five years, and that the said lease to their said trustee, Henry Van Schaick, was made upon such agreement, and for said extended term.

That by an instrument of declaration of trust by and between said association and partnership and said Henry Van Schaick, made and dated August 17th, 1853, and duly delivered to and accepted by them at their special request, and said association, in compliance with its previous agreement and duty so to do, assumed the covenants and obligations on the part of said Henry Van Schaick, to be performed and kept in and by said lease for themselves, and the corporation to succeed them, and that said declaration of trust is in these words: (This paper is sufficiently referred to in the opinion of the Court.)

That by an indenture dated October 8th, 1853, made by Henry Van Schaick and others and the Defendants, mentioned and referred to in the pleadings, the Defendants also, in accordance with the previous agreement so to do, and in pursuance of said resolution passed August 17th, 1853, assumed the place of the lessee in the said first-mentioned lease, and all the covenants and duties therein contained.

That the said instrument or declaration of trust, between Henry Van Schaick and the said partnership, having been made for the benfit of the Defendants, and having been confirmed and adopted by them and the Plaintiff, became, on the incorporation of the Defendants, and by virtue of the making thereof and of such adoption, the contract of the Defendants; and that the Defendants are bound to, and in behalf of, the said Henry Van Schaick, as well as to the Plaintiff, to keep and perform all the duties and covenants of the lessee in said lease. That the Defendants took immediate possession of the premises leased and used by them, and thereby impliedly agreed to pay the rent and perform all the covenants of the lease, and assume the position of lessee of the Plaintiff, and as such agreed to indemnify said Henry Van Schaick against the covenants therein contained.

That when the Defendants took the assignment of said lease from the said Henry Van Schaick, they carried out and gave effect to the original agreement between and to the intention of all parties; that when the Defendants became legally organized and competent to take title, they were to become the

lessees of the premises, and would subject themselves to the performance of all the covenants contained on the part of the lessee.

That the said Defendants, on the 15th day of January, 1858, duly assigned the said lease to Samuel Searles, as in their supplemental answer mentioned.

That the said Defendants, on the 1st day of February, 1858, gave and yielded up the possession of the said premises to the said Samuel Searles, and that they have paid all the rents, taxes, and assessments and charges by the said lease, due or required to be paid, up to the 1st day of February, 1858.

And the said Justice found, as the conclusions of law in this action:—

That the Defendants are subjected to the burdens of said lease, certainly to the extent of relieving and indemnifying Henry Van Schaick to the extent of his liability to the Plaintiff; and such right to indemnity of said Henry Van Schaick is the property of the Plaintiff.

That in equity the Plaintiff is entitled to enforce against the Defendants the duties and covenants in said lease contained, they having accepted the same as made for their benefit and advantage, and having used and occupied the premises under the said lease, as lessees, and not otherwise.

The Plaintiff is entitled to recover against the Defendants the amount of unpaid rents from the 1st day of February, 1858, quarterly, with interest thereon.

That the Defendants pay, discharge, and satisfy all the unpaid taxes and assessments on the lands described in said lease.

That said Defendants pay the rent already due, and the rent to become due, and payable upon said lease as the same shall become due and payable; and also pay and discharge seasonably all taxes and assessments which have been or may hereafter be levied, assessed, or charged upon said premises during the term in said lease expressed.

Clarkson N. Potter for the Appellant.
William Tracy for the Respondents.

HUNT, CH.J.—By the resolution of August 16th, 1853, passed by the parties then composing the Third Avenue Railroad Company, it was resolved that, "in order to carry into effect the resolution of leasing from Myndert Van Schaick the thirty-three lots on Sixty-first street, it was expedient that a lease of fifteen years, at $3000, with taxes, &c., should be executed by Myndert Van Schaick to Henry Van Schaick, to be held by him for the benefit of this company, or such other company as may hereafter be formed to carry on the Third Avenue Railroad Company; and that the President be authorized, on behalf of this company, to agree with Henry Van Schaick that this company, or such other company as may hereafter be formed in its stead (as above), will and do assume the performance of all covenants contained in said lease, which are to be performed by said Henry, on condition of his agreeing to assign said lease to this company, or to such other company as shall hereafter be formed in its stead, upon request duly made to him."

The agreement of August 17th, 1853, between Henry Van Schaick and the partnership, was to the effect that the lease above referred to was made for the benefit of the company, or such other company as should thereafter be formed to succeed them, in building and running a railroad through the Third Avenue; that Henry Van Schaick agreed that he would at any time assign the lease to the said partnership, or any company thereupon to be formed, upon request; and the company agreed that they would and thereby did assume the performance of all the covenants in said lease by him agreed to be performed.

There can be no doubt that the railroad partnership was bound by these instruments to stand in the place of Henry Van Schaick as lessee, and to indemnify him against all liability to loss on account of the existence of the lease. He was a simple, naked trustee for their benefit. He entered into the lease upon their request, and their agreement to assume all liabilities undertaken by him.

Nor do I see any difficulties, upon well-settled principles, in

holding that Myndert Van Schaick could have maintained an action directly against the partnership to recover the amount of his rents. The lease was in law the lease of the partnership, through Henry Van Schaick, their agents, or, if not such, was expressly assumed as their lease, and an action against them given to the lessor by the terms of the instrument of August 17th, 1853.

These agreements were made in terms, not only for themselves, but for and in behalf of any corporation that should afterwards be organized to conduct and operate the said Third Avenue Railroad. It seems to have been assumed from the outset that a corporation would be formed to execute the duties then performed by the partnership; and all the rights reserved to the partnership, and all the duties imposed upon it, were to fall upon such incorporation.

The corporation when organized took immediate possession of the premises, leased them, and used them for their own purposes, and, in my judgment, impliedly agreed to perform all the covenants of the lease, and to indemnify Henry Van Schaick against any liability on the same.

I concur in the judgment of the Justice of the Special Term, that the facts established an assumption of the liabilities of the lease by the Defendants, and that they are bound to perform its covenants. The Appellant's counsel claims that the question of the implied assumption of the liability of the lease by the Defendant is a question of law, and not fact. He takes up each of the ten items from which it may be supposed that the Justice trying the cause drew his conclusion of an implied assumption of the lease, and argues that they do not necessarily show an assumption, and are not inconsistent with a determination not to assume the obligations of the lease. I do not concur in such conclusion, neither is that the mode of determining the question in this Court. The facts are examined and passed upon by two impartial tribunals, the Special Term and the General Term, before each of which the parties were at liberty to defend or attack any position of facts at their pleasure.

When the case reaches this Court the facts are assumed as in

all respects adopted by the General Term, and we review the questions of law arising upon an established state of facts. Certain principal facts are proved. Certain other facts are proved not of themselves decisive, but as forming the groundwork of inferences or conclusions. These inferences or conclusions are the final facts of the case, and we are as much bound by the deductions and conclusions of the Judge or the jury in regard them as by their finding of the principal facts. In the present case it is proved, among other things, that the Defendants, having full knowledge of the terms of the lease, and of the agreements made in respect to it in reference to the corporation to be organized, received an assignment, entered into possession of the demised property, and used and occupied it for many years. Now I take it, that the intent with which this was done is a question of fact rather than a question of law. It may have been with one intent, or to effect or in pursuance of one plan, or upon an altogether different idea.

The jury, or the Justice, when sitting in its place, solves the question as a matter of fact, and not the Court as a question of law. Having settled it as a matter of fact against the Appellant, we receive it as finally settled and disposed of. It is considered, in my judgment, as settled by the findings of the Justice of the Special Term. I cite a few cases where the decision was held to belong to the jury, although the facts were undisputed: Sheridan *v.* Brooklyn R. R., 36 N. Y. 39; Ireland *v.* Oswego Plankroad, 13 N. Y. 533; Oldfield *v.* N. Y. & H. R. R., 14 N. Y. R. 310; North Pa. R. R. Co. *v.* Heileman, 49 Pa. R. 60. See also 11 Wend. 629; I Denio, 462; 23 Wend. 653; 2 N. Y. 43; 8 Cow. 25.

I am quite well satisfied, also, with the reasoning and argument of the opinion in the Court below, showing the assumption of the obligations of the lease by the Defendants, and think that in fact such obligations were assumed by the Defendants.

Upon both grounds, the judgment should be affirmed, with costs.

MILLER, J.—The facts of this case show beyond any question that the lease from Myndert Van Schaick, the original Plaintiff, and one of the associates who constituted the association formed to construct and operate the Third Avenue Railroad, to Henry Van Schaick, another of said associates, was made at the request and for the benefit of such company, or such other as might be thereafter formed to succeed them in the business of building and running said railroad, and that the company, and such other as might be formed in its place, were to assume, and did assume, the performance of all the covenants in the lease.

This arrangement was substantially carried into effect, Henry Van Schaick merely acting as trustee for the benefit of his associates, and not as the lessee of the premises, or as an individual.

The declaration of trust which accompanied or immediately followed the lease evidently indicates an intention that the corporation which was to be formed was to be the beneficial lessee of the premises, bound by the covenants and conditions of the lease, and that they were not to be holders of the property as mere assignees, with power to divest themselves of liability by an assignment to another party.

When the corporation was formed, it continued in possession of the property, paid rent to the lessor, accepted the lease in question, and assumed to perform its covenants and conditions; and by means thereof they became liable to the Plaintiff for any failure to fulfill, and for any default. The action, therefore, was properly brought, and the judgment at the Circuit was right. I also think the action is maintainable within the principle of Lawrence v. Fox, 20 N. Y. 268, which holds that an action lies upon a promise made by the Defendants, for a valid consideration, to a third person, for the Plaintiff's benefit, although the Plaintiff was not privy to the consideration.

The judgment should be affirmed.

JOEL TIFFANY,
State Reporter.

GEORGE JULIAND, RESPONDENT, v. PETER B. RATHBONE ET AL., APPELLANTS.

General Assignment—Failure of Assignee to file Schedules and give Bond —Statute of 1860.

That rule of construction, where the statute gives a remedy in addition to one existing at common law, without negative words, showing that the Legislature intended to make it exclusive, does not apply where the Act creates no new remedy, but is designed to regulate one already existing. In the latter case the rule is to consider, *First,* the mischief to be remedied; and *Second,* the remedy intended to be applied.

Action to recover damages for the taking and conversion of personal property consisting of a quantity of dry goods. The goods in question were, in May, 1860, the property of Nichols, who, on the twenty-first of that month, made an assignment thereof to the brother of the Plaintiff, in trust for his creditors, giving preferences. The assignment was acknowledged and the certificate thereof endorsed before delivery, as required by the act of 1860. The assignor did not make and deliver to the County Judge the inventory of his property, schedule of his creditors, &c., required by the act, until July 24, 1860, nor did the assignee give the bond required by the act until the 23d of July, on which days, respectively, these acts were done. The assignee took possession of the as-

Assignment for creditors—Failure to give bond. 71 *N. Y.* 506 (4 *Abb. N. C.* 287); 75 *N. Y.* 191; 67 *N. Y.* 203; 3 *Hun,* 595 (6 *T.* & *C.* 305); 8 *Hun,* 518; 13 *Hun,* 177; 49 *How. Pr.* 277; 5 *Abb. N. C.* 315; 22 *Abb. N. C.* 386 (6 *N. Y. Supp.* 499); 16 *Abb. N. S.* 316; 7 *Daly,* 60.

Officers—Public—Duties—Directory statutes. 164 *N. Y.* 397; 168 *N. Y.* 435 (32 *Civ. Proc.* 232).

Distinguished. Assignment for creditors—Failure to file schedules. 52 *How.* 161.

Assignment for creditors—Failure to acknowledge. 15 *Daly,* 426 (28 *St. Rep.* 414; 8 *N. Y. Supp.* 100).

signed property, and sold portions thereof from time to time, until the 20th July, when he sold the residue of the goods, the property in question, to the Plaintiff, who paid therefor in cash and demands he held against Nichols, which were preferred in the assignment. The Plaintiff, upon his purchase, took possession of the goods, and received from both the assignee and assignor bills of sale, transferring their title of the goods to him. On the 23d of said July, the assignee filed with the County Clerk his bond, with sureties in the amount fixed by the County Judge, by whom the sureties were approved, and with the condition required by the third section of the act (Laws, 1860, Chap. 348), on the 24th of July, 1860. The assignor made an inventory of his property, and a schedule of his creditors, &c., verified by him, as required by the second section of the act of 1860, and delivered the same to the County Judge. After the filing of the bond of the assignee with the County Clerk, and before the levy by the Defendants, the assignee gave a second bill of sale of the goods to the Plaintiff, with a view to validate the sale, should his title be held defective. The Plaintiff also proved the taking and sale of the goods by the Defendants, and their value. The Defendants proved the recovery of a judgment in the Supreme Court against Nichols, on the 20th of July, 1860, and the issue of an execution thereon, and its delivery to Darby, and with the deputy of Rathbone, his co-Defendant, who was sheriff of Chenango county, for collection, before the filing of the bond by the assignee, who, on the 25th, levied the same upon the goods in question, and afterward sold the same by virtue thereof. At the close of the evidence the Defendants' counsel moved for a nonsuit, upon the grounds that the assignment of Nichols became void by the failure of the assignor to deliver an inventory of his property, &c., within the time required by the act of 1860, and of the assignee to give his bond as so required, and upon other grounds. The motion was denied, and Defendants' counsel excepted. The counsel requested the Court to charge the jury as in accordance with the above propositions. The Court refused, and the counsel excepted.

The counsel requested the Court to submit to the jury, as a question of fact, whether the assignment by Nichols was made with a view to defraud his creditors? The Court refused, and the counsel excepted. The Court submitted to the jury the question as to the value of the property, and directed them to find a verdict for the Plaintiff for such value. To which direction the counsel for the Defendants excepted. The jury so found. The Court stayed the entry of judgment, and ordered the exceptions to be heard by the General Term. That Court, upon such hearing, denied a new trial, and ordered judgment for the Plaintiff upon the verdict. From which the Defendants appealed to this Court.

S. S. Merritt for Respondent.
Rexford & Kingsley for Appellant.

GROVER, J.—The Respondent's counsel insists that the judgment in the present case it not appealable to this Court, and cites Van Bergen *v.* Bradley, 36 N. Y. 316, in support of his position. The cases are not analogous. In the latter the judgment was entered upon the verdict without any order therefor by the General Term. In the present case the judgment was rendered upon the order of the General Term. It was, therefore, appealable to this Court without any further proceedings in the Supreme Court.

This case was regarded by the Supreme Court as involving the question whether an observance of sections 2 and 3 of chap. 348, Laws of 1860, by the assignor and assignee respectively within the time therein prescribed for the performance of the acts required, was necessary to the validity of the title of the assignee to the assigned property. That Court held these sections directory, and consequently that non-compliance with their provisions within the time prescribed did not impair the title of the assignee. In this I cannot concur.

The first section of the act provides that the assignment shall be duly acknowledged by the assignor and the certificate thereof duly endorsed before delivery to the assignee. Sect. 2 of the Act provides that the assignor shall at the date of the as-

signment, or within twenty days thereafter, make and deliver to the Judge of the county of his residence a schedule verified by him as prescribed by the act containing a full and true account of all his creditors, and their residence, as far as known; the sum owing to each creditor, and the nature of the debt, and how it arose; the consideration of the debt and place where it arose; a statement of any security for any debt; an inventory of all his estate, and the incumberances thereon, if any, and of the value of such, according to the best knowledge of the debtor.

Sec. 3 provides that the assignee shall, within thirty days after the date of the assignment (and before he shall have power or authority to sell, dispose of, or convert to the purposes of the trust any of the assigned property), enter into a bond, with sureties, as prescribed by the section.

In construing these two latter sections the Supreme Court, as appears from the opinions delivered, applied the rule adopted in the construction of statutes prescribing the time for the performance of official acts by public officers in the performance of which the public have an interest. In construing these latter statutes, it is well settled that when the act prescribes a time for the performance of the act, without anything prohibiting the doing it after the time so fixed, the act shall be valid if performed after the time prescribed.

The reason for this construction is, that the public, or some portion thereof, have an interest in the performance of the act, and to prevent injury from the neglect of the officer the rule has been adopted. That class of cases, holding that where the common law confers a right or gives a remedy, and a statute is enacted conferring a new right or giving a new remedy, will be so construed as not to take way the common law right or remedy, unless it contains negative words, showing that such was the legislative intent, was somewhat relied on. Neither class is analogous to the present statute. The acts to be performed are by private persons, not public officers. The act creates no new right or remedy, but is designed to regulate an existing right merely.

In construing such statutes, the common law rule, as laid

down by the elementary writers, is to consider: First, What mischief, if any, resulted from the exercise of the common law right. Second, What is the remedy provided by the statute for such mischief? Third, To give the statute such construction, if practicable, as will suppress the mischief, and make the remedy efficient, applying the rule to the present statute. The mischief to be remedied is obvious. To prevent pretended assignments being made obstacles in the way of creditors.

The first section provides that it shall be acknowledged, and the proof thereof (1) certified, before delivery. This Court has held (case not reported) that an assignment delivered without such acknowledgment and certificate is void.. This does not necessarily determine the effort of non-compliance with the requirements of the two following sections, as the judgment may be upheld by the provision that the acknowledgment, &c., shall be made before the delivery of the assignment.

But in the absence of this, I think the same construction should be given to the clause, which then would read, "Every conveyance, &c., made by a debtor in trust for his creditor shall be acknowledged." Experience had shown that debtors frequently, with a view to defraud their creditors and make compositions with them advantageous to themselves, made general assignments of all their property in trust for creditors, giving no information of the character, situation, or value of the property assigned, or the amount of the debts, residence of creditors, whether the debts were secured, and giving no information to a creditor to enable him to ascertain anything in relation to the value of the property assigned, or the amount and bona fides of the debts entitled to share in the proceeds of the property. To remedy this, the second section provides that within twenty days from the making of the assignment the assignor shall make a schedule, verified by his oath, giving all the requisite information. This information will enable the creditors to defeat fraudulent assignments. The intention of the Legislature was, I think, to require this schedule to be made as a necessary part of a valid assignment, and as a pre-

(1) See Transcript Appeals, Vol. 6, 323, Hardman v. Bowen.

requisite of vesting an absolute title to the property in the assignee.

In view of the fact that time for the preparation of this statement might be required, twenty days were given for this purpose, after the delivery of the assignment, and in the meantime the title vested in the assignor was good against creditors, provided it was thereafter perfected by a compliance with sections 2 and 3 of the act; but in the case of failure so to comply, the assignment must be adjudged void.

This construction will render these sections efficient in suppressing fraud, while that adopted by the Supreme Court renders them almost nugatory and useless. The class of cases relied upon in the Supreme Court for holding these sections directory and therefore nearly, if not quite, useless, we have endeavored to show, rest upon a principle peculiar to themselves, having no analogy to the present case; and while their authority is fully recognized, they do not justify, much less require, a construction that will defeat the manifest intention of the Legislature, so to regulate the exercise of the rights of debtors in making assignments of their property in trust for creditors as to defeat fraud and insure the application of the entire property to the payment of honest debts.

Assignments were frequently made to assignees destitute of pecuniary responsibility. To remedy this, section 3 provides for giving security for the performance of the trust by the assignee within thirty days after the making of the assignment; and that until this is done the assignee shall have no power or authority to sell the property, or convert the same to the purposes of the trust. This shows that the assignee does not acquire title to the property absolutely until he gives the security. An absolute title includes the power to sell and dispose of it. This he clearly has not until the security required is given. But it may be said that his title may be perfected by giving the bond after the thirty days. If this be so, he may delay for any length of time. Remove the statutory limit of thirty days, and there is no limit whatever to the time during which the property may be tied up beyond the reach of creditors.

Their only relief is an application to the Court to administer the trust; and hence this section, instead of securing creditors against irresponsible trustees, would only, by creating facilities for delay, afford additional means to debtors to defraud their creditors.

I think the true construction of the statute makes a strict observance of secs. 2 and 3 essential to the validity of the assignment, and that a non-compliance renders the assignment void as to creditors, whenever their right to the property attaches. It is said that this will place it in the power of the assignee to defeat the assignment by failing to give the bond. This is true.

But he may in the first instance refuse to accept the assignment, and in that event it would never have any effect. Assignors must see, in selecting assignees, that they will not only accept, but that they can and will give the bond required; and assignees must take care to complete the assignment by giving the necessary schedule. It follows that the judgment cannot be sustained upon the validity of the assignment.

It remains to consider whether the judgment was right, conceding that the assignment had become inoperative. No question was made upon the trial but that the Plaintiff was a bonâ fide purchaser of the goods in question before he received a bill of sale from both assignor and assignee, at the time of the purchase, and took immediate possession of the goods. If the title was in either at the time of the purchase, the Plaintiff acquired it. True, he paid the purchase-money to the assignee,, but this was with the assent of the assignor, and was equally effectual as if he paid to the latter. If the Supreme Court was right in holding secs. 2 and 3 directory, the title was in the assignor, and the second bill of sale given by the assignee after he gave the bond, gave a good title to the Plaintiff, and this would be the effect although the assignment was fraudulent. (Sheldon *v.* Stryker, 42 Barb. 284.)

If I am right in my conclusion that the assignment had become inoperative by a failure to comply with secs. 2 and 3 of the act, the title was in the assignor, and the bill of sale from

him to the Plaintiff conferred a good title to him. In either event the motion for a nonsuit was properly denied. The Judge was right in refusing to submit to the jury the question whether the assignment was fraudulent. That was immaterial. It was not claimed that the Plaintiff had any notice of any fraud.

The Defendant made no request to have any other question of fact submitted to the jury except the one above mentioned. The Judge did not err in directing a verdict for the Plaintiff for the value of the property.

The judgment appealed from must be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

THE INTERNATIONAL BANK, RESPONDENT, v. WILLIAM MONTEATH, APPELLANT.

Bill of Exchange—Liability of Bank—Failure to Protest—Title to Bill—Collateral Securities.

When a bank, having a draft for collection, neglects to protest the same, it not being paid at maturity, whereby the drawer is released from liability thereon, such bank is liable to all damage sustained by reason of such neglect.

And such bank being so liable, paying said draft or a judgment recovered thereon, is vested with the legal title to the same, and may maintain an action thereon against the acceptor of the draft.

THIS action was brought to recover of the Defendant the amount of a bill of exchange for $2,316.58, drawn by Brown & King, of Toledo, Ohio, upon the Defendant, who resided at Buffalo, in this State. It was dated 19th August, 1857, was payable ten days after date, and was accepted by the Defendant. It was discounted by the Bank of Toledo, and was transmitted by that Bank to the Plaintiff for collection. When the draft matured, the Plaintiff neglected to protest it; so that the drawer was released from liability. The Bank of Toledo claimed damages for this neglect, and, after a controversy in the courts,

judgment was recovered for it against the Plaintiff, in the payment of the judgment. The Bank of Toledo delivered the draft to the Plaintiff, who thereupon commenced this action.

The Defendant set up the defence, that the draft was transferred by the Bank of Toledo to the Plaintiff without consideration, and that therefore it was not the owner of the draft.

The answer also set up, by way of counter-claim, a demand against the Plaintiff, growing out of the alleged conversion of fifty shares of the stock of American Transportation Company belonging to the Defendant.

The only legal question in this case is, whether the payment by the Plaintiff of the judgment recovered against it by the Bank of Toledo operated to transfer the title in the draft to the Plaintiff. Of this there can be no reasonable doubt. The Bank of Toledo willingly delivered possession of it to the Plaintiff, and with it transferred all its rights in relation to it to the Plaintiff. The Bank of Toledo, instead of suing the Plaintiff, could have sued the Defendant on his acceptance; but, as he was deemed insolvent, the Bank sued the Plaintiff for its neglect, and on payment of the judgment, had a right to transfer it to the Plaintiff.

J. H. Reynolds for the Appellant.
J. L. Talcott for the Respondents.

GROVER, J.—The exceptions taken by the Defendant's counsel to the rulings of the Judge upon the trial, present for consideration the questions whether the Plaintiff was the owner of the draft in suit; and, second, whether the Judge erred in holding that the value of the American Transportation Company's stock could not be allowed to the Defendant as a counter-claim in this action.

Upon the question of Plaintiff's title to the draft in suit the evidence showed that the draft was owned and held by the Bank of Toledo; that it was sent to the Plaintiff's endorser in the usual manner for collection; that the draft was not paid by the acceptor, the Defendant, at maturity; that the Plaintiff neg-

lected to protest the draft, and to notify the drawer of its non-payment; that, for this neglect, the Bank of Toledo brought an action against the Plaintiff, and recovered therein a judgment for the amount of the draft, which was paid by the Plaintiff; that the Plaintiff, upon payment of the judgment, demanded the delivery of the draft to it; that the draft was thereupon delivered to the Plaintiff with the assent of the Bank of Toledo. These facts established a title in Plaintiff to the draft.

The only inference that can be drawn from the evidence is, that, upon payment of the judgment, the Plaintiff claimed the delivery of the draft to it as its property; that the Bank of Toledo recognized this claim, and, in pursuance thereof, delivered the draft to the Plaintiff as its property, so endorsed as to confer the title. This gave the Plaintiff a complete title, irrespective of the inquiry whether any was acquired by the recovery and payment of the judgment.

The question arising upon the counter-claim of Defendant, founded upon the Transportation Company's stock, arises out of the following facts: Prior to the time of the maturity of the draft in suit, the Defendant, being owner of the stock in question, delivered the certificate with the usual power of attorney for the transfer thereof to the Plaintiff as security for a debt which had been paid at the time of the maturity of the draft in suit at that time, the certificate and power remaining in the hands of the Plaintiff.

The Defendant testified that he made a sight draft upon Grant & Co., New York, for the amount of the draft in suit, and delivered the same to the Plaintiff, together with his check for the proceeds, for the purpose of paying the draft in suit, and told the Plaintiff he would hold the stock as collateral to the sight draft, the witness understanding that the Plaintiff would discount the sight draft. The sight draft was protested for non-payment, and defendant duly notified.

The Defendant, upon learning from the Plaintiff that the sight draft had not been discounted, requested the Plaintiff to deliver the stock to him, which the Plaintiff refused.

The case states that the Plaintiff gave evidence tending to

show that the Defendant agreed that the Plaintiff might retain the stock as security for the payment of the draft in suit. The case further shows that at this time the stock was worth about four thousand dollars, but that subsequently the company failed and the stock became worthless, and so continued down to the trial. It thus appears that there was a conflict in the evidence whether the Defendant agreed that the Plaintiff might hold the stock as collateral to the sight draft, or as security for the payment of the draft in suit.

This was a question of fact to be determined by the jury, if material to the rights of the parties in the suit. It was material if its determination either way gave to the Defendant a valid claim against the Plaintiff, founded upon contract, for the loss of the stock, as in that case he would have had the right to avail himself of the demand as a counter-claim in the action. (Code, § 250.) Had the jury found that the stock was only pledged to the Plaintiff as collateral security for the sight draft, it would have followed that the Plaintiff, at the time the Defendant requested him to return the certificate to him, had no claim to, or lien upon, the stock, as the bank never discounted the sight draft, or in any way acquired any interest therein, and it would also have followed that the Defendant could have maintained an action against the Plaintiff, upon its refusal to deliver to him the stock.

It is clear that an action of tort, under these facts, could have been maintained for the conversion of the stock. That would not have availed Plaintiff upon the trial, as, if a tort action only could have been sustained, it was not available as a counter-claim. The inquiry is, whether an action upon contract was not also sustainable. Where a party receives property as a pledge, the law implies a promise by the pledgee to restore such property, upon request to the pledger upon performance of the obligation to secure which the pledge was made, and, for a breach of this implied promise, an action founded thereon may be maintained. It is the case where the law affords two remedies, and in such cases it is well settled that the injured party may elect to pursue either.

It follows that the Defendant had the right to avail himself of the counter-claim in the action, in case the jury found that the Defendant only agreed that the Plaintiff might retain the stock as security for the sight draft. He clearly had no such right if he agreed that the Plaintiff might retain it as security for the payment of the draft in suit. That had never been paid. The Plaintiff, at the time, was the agent of the holder for its collection, and, although not authorized to receive collateral security for its payment, the owner had the right of ratifying such act, and thus making it valid. The Plaintiff had the right to retain the security until disaffirmance by the owner. There was no proof of disaffirmance, and, if the Defendant agreed that the Plaintiff might retain the stock until the draft was paid, he had no right to have it delivered to him, and he had no valid claim against the Plaintiff on account of the stock.

The Court decided that the counter-claim could not be allowed in this action. I think this ruling must have been understood as rejecting the counter-claim upon any view of the evidence, and as a refusal to submit any question to the jury in regard to it, so under stood, it was erroneous. It is true that the evidence that the Defendant pledged the stock as security for the payment of the draft in suit, may have been so conclusive as to justify the judge in directing a verdict for the Plaintiff. But the case does not show this. It merely states that the Plaintiff gave evidence tending to show such fact. It may have been of much or little weight, for aught that appears.

My conclusion is, that the judgment should be reversed, and a new trial ordered.

Judgment reversed.

JOEL TIFFANY,
State Reporter.

ISAAC SNYDER, RESPONDENT, v. WILLIAM H. TRUMPBOUR AND OTHERS, COMMISSIONERS OF HIGHWAYS OF THE TOWN OF SAUGERTIES, AND JOHN PLASS, APPELLANTS.

Highways—Width of Road—Improved Lands—Injunction.

Where the Commissioners of Highways order a road to be laid out for a part of the distance, three rods in width, and for the residue of the distance, which covers the bed or track of an old road used for more than twenty years, two rods in width, the proceedings are not thereby vitiated.

An injunction will not for such cause lie to restrain the Overseer of Highways from opening such road.

THIS is an appeal by the Defendants from a judgment of the Supreme Court in favor of the Plaintiff, rendered in the Third District.

The action was brought to restrain the Defendants from opening a highway upon the premises of the Plaintiff, which was claimed by the Defendants to have been legally laid out by the commissioners of highways, and that Plass, who was an overseer of highways of the town, entered upon the premises under the direction of the commissioners for the purpose of opening the road.

The cause was tried before Mr. Justice Gould, without a jury, at the Ulster Circuit, in May, 1860, and the Plaintiff prevailed.

The Justice before whom the cause was tried found the following facts:

That on the 14th of November, 1855, John Plass and Abraham A. Dewitt made application in writing to the commissioners of highways of the town of Saugerties, to lay out a highway in said town. In said application the general route of the road, the respective termini, and the parcels of land through which the same would run were given. The applicants were both residents of the town, and liable to be assessed for highway labor therein. The applicants caused the proper notices to be posted of a meeting of the freeholders on the 26th of November, 1855, to examine the ground and certify in respect to the necessity of the proposed road.

On the 26th of November, 1855, twelve competent freeholders of the town appeared, were duly sworn, examined the route, heard the reasons for and against the road, and signed a certificate that the road was necessary, and the same was placed in the hands of the commissioners of highways.

The commissioners thereupon gave notice that they would meet on the 27th of June, 1856, to decide upon the application; and on that day they met and heard the parties interested and determined that the road should be laid out, and made an order to that effect, incorporating a survey of the road; and on the 14th of August, 1856, filed the same in the office of the town clerk of Saugerties.

That a portion of the road so laid out between the points at which it strikes the old road, to the point in said order called "the centre of the road known as the old churchland lane, near a hickory-tree, in range with an apple-tree," was laid out by the commissioners over and covering the bed of an old road used as a public highway for twenty years, the track being not over seven feet wide, bounded on the west by a side hill, and so situated as to be conveniently widened only on the east side, and that part of the survey and order was for a road only two rods wide.

That at the point in this portion of the road included between the division line of Isaac Snyder and the churchland lane, the *easterly line of the survey extended into an orchard* of the Plaintiff of the growth of seven years and over.

On the 25th of August, 1856, the Plaintiff appealed from the determination of the commissioners, and thereupon Referees were appointed by the Ulster County Court to hear the appeal. The Referees affirmed the acts of the commissioners, and the damages to land-owners were ascertained in the manner directed by statute.

The commissioners thereupon directed the removal of fences upon the highway so laid out, as required by the statute. That in order to carry their determination into effect the commissioners of highways directed the Defendant, John Plass, who

was a regular overseer of the road district in question, to enter upon the road and dig, excavate, and open the same.

That in pursuance of this order, Plass proceeded to discharge his duty, and entered upon a portion of the Plaintiff's premises taken for said road for that purpose, and commenced the work of digging and excavation; but no part of the entering upon, digging, or other injuries complained of by the Plaintiff, were upon that section of the road laid out but two rods wide, or on that section of the survey which bordered upon or extended on to the Plaintiff's orchard or door-yard, but such digging was on that portion laid out three rods wide, and did not extend into or adjoin the orchard.

The Justice also found, among others, the conclusions of law as reported in Snyder *v.* Plass (28 N. Y. 465).

The said Justice, upon the foregoing facts, decided as matter of law, that inasmuch as one part of the proposed road was laid out less than three rods wide, the order was void, and the commissioners, and all acting under them, were trespassers, and ordered an injunction against Defendants. The questions made are sufficiently stated in the opinion.

The Defendants duly excepted and appealed to the General Term, where the judgment at the Circuit was affirmed, and the Defendants appeal to this Court.

John H. Reynolds for Appellants.
Erastus Cooke for Respondent.

MILLER, J.—In Snyder *v.* Plass (28 N. Y. 465) the Plaintiff in this action brought an action to recover damages for an alleged unlawful entry of the Defendant, who was an overseer of highways, acting under the directions of the commissioners of higways, who are Defendants in this case, upon the premises of the Plaintiff, in opening and working a portion of the road in question, and it was held that the Plaintiff could not recover.

The decision of the Court was in part upon the ground, that where a road was ordered by commissioners of highways to be

laid out for part of the distance three rods in width, and for the residue of the distance, which was the bed or track of an old road used for more than twenty years, two rods in width, the proceedings are not vitiated and rendered void by the provision in the order allowing a road to be opened which is only two rods wide. It was further held, that regarding the first part of the order laying out the road, up to the point of intersection with the old road, as valid, and the residue as a description of the old road to be recorded, and for the purpose of having it opened two rods in width by a subsequent order to that effect, the whole is consistent and harmonious, and entirely within the powers of the commissioners. It was also decided that the fact that one line of the survey extended into an orchard of over four years' growth, was not of itself sufficient to make out a case within the language of the prohibition of the statute against the laying out of a highway through an orchard, yet in such case the commissioners would have no right to deprive the owner of the benefit of fruit-trees in an orchard of the growth of four years or over, by an order for the opening of an old road to the width of two rods. The facts in this case at bar, and the one cited, are essentially alike, and the only apparent difference seems to be that the one cited was for an entry upon the Plaintiff's premises, while the case under consideration is for an injunction to restrain the commissioners from making any such entry. In attempting to make a distinction between them, and as a view of the subject not embraced in the case decided, it is claimed by the counsel for the Respondent that there is an impossibility of identifying the line of the road, as laid by the commissioners, with that applied for, certified to by the freeholders and described in the notice of the commissioners.

It is not entirely apparent that any such difficulty exists from an examination of the case. It does not appear from the findings of the Court upon the trial, and I am unable to discover it elsewhere. The notice describes the road as commencing at the shop of Jeremiah Wolven, and running a northeasterly

course to the farm of Andrew Dewitt, Jr., thence to the churchland lane, near the house of Isaac Snyder, and as passing through or over the improved lands of Jeremiah Wolven, and the unimproved lands of several persons, including the land of the Plaintiff, and the terminus must be considered. I think, as located according to the survey at the centre of the road known as the old churchland lane, in conformity with the application, although to reach this terminus the old road is included in the survey.

As we have seen, the Court have held that the proceedings are not void because a part of the route is over the old road, and thus have passed upon the question as to the termination of the road, and we are not at liberty to treat it as a new question not presented in the former hearing of the case.

It is said that the terminus is reached in a different direction from that described in the notice, and so far at variance with the original application as to render the proceedings void on that account. This fact is not proved by direct evidence. No map or diagram was introduced to establish any such divergence from the road applied for, nor was any such point presented and considered in the Court below or in the case cited.

The road as surveyed was no doubt located through other improved lands besides those which were mentioned in the original notice, and it would appear through the improved land of the Plaintiffs, but it is by no means manifest from the case itself, or the findings, that the general route proposed was not followed, or that any new route was pursued essentially different from the one contemplated. On the contrary, the Justice who tried the cause has found that the freeholders, after examining the route of the proposed highway, did make and sign a certificate that it was necessary and proper; that the commissioners gave the requisite notice, determined to lay out the highway, and did sign a certificate of such determination describing the road, according to a survey which they had previously caused to be made. With the facts presented, it is difficult to see how there can be any real foundation for the claim

made that the road in its general course differed entirely from the one applied for. The mere fact that the road passed through improved lands other than those mentioned as such in the application, of itself does not establish the material change alleged to have been made, and at most shows that lands stated to be unimproved, actually were improved lands.

It is also urged as a feature of the case to which the attention of the Court was not directed upon the argument of the case cited, that the notice of the meeting of the commissioners was necessary to give jurisdiction to lay the road over improved land.

The case and the findings of the Court show that notice of the application was duly served, and that the commissioners, before determining to lay out the road, caused notice in writing made and subscribed by each of them, specifying the time and place where they would meet to decide upon the application, to be served in due form of law upon the respective occupants of the several tracts of land through which the road was to run. The fact that the notice did not specify that the lands of the Plaintiff, and others, were improved lands, which appears to be the basis of the objection made, I think was not mentioned, nor of a vital character. No notice is necessary when the lands are unimproved. (R. S. Part 1, Chap. 16, Tit. 1, Art. 4, § 55-62, pp. 473, 474, 1 Vol. Ed. ed.) And notice having been given to the occupant of the land, it was not defective because it erroneously stated that some of the lands improved were unimproved. It was sufficient, I think, to confer jurisdiction that the party had notice of, and abundant opportunity, to be heard upon the application.

It is also insisted that the establishment of a new road over that part of the route, described as two rods wide, was void for two reasons. First: Because the statute allows no such road to be laid out; and Second: That it was laid out through the Plaintiff's orchard in defiance of the statute. The decision of the Court in the case cited, I think, disposes of and covers these objections. Johnson, J., in his opinion, holds that the commis-

sioners had the power in respect to the old road to have a descriptive survey made of it, to have the description entered of record, and to order it opened to the width of two rods at least; that this was precisely what they had done, and what they were strictly authorized to do by statute, unless it be the interference with the orchard. As to the orchard, he holds that the finding of the Court that one line of the survey extended into an orchard, was not enough to establish that it would interfere with the orchard, and that it should have been proved that the trees came within the survey, and that the owner would be deprived of the beneficial use and enjoyment of the trees by such survey or opening of the highway.

Judge Denio's opinion, as I understand, is not in conflict with these views on either of the points suggested. And, as we have seen, both of the learned Judges agree that even if the order opening the old road was illegal, it did not affect the validity of the order laying out the new road. It would therefore appear to be unimportant whether the old road was properly laid out and opened, for it is proved to the Court in this case, as well as the one cited, that the entry of the Defendants complained of and proved upon the trial of this cause, and to restrain the Defendants from proceeding with which this action is brought, was made on that part of the road which is three rods in width, and did not extend into or adjoin the Plaintiff's orchard. The two cases are so entirely similar and identical that it is not easy to discover a distinction between them which would justify a disregard of the one cited as authority. The questions involved upon this appeal must therefore be considered as res adjudicata, and if the action to recover damages for the entry of the Defendant Plass, under the directions of the commissioners, who are Defendants here, cannot be sustained, then it necessarily follows that an action will not lie to restrain the Defendants from opening the road in question.

Some other points are pressed upon our consideration, based upon the hypothesis that the questions involved in this case are undecided; but if the views I have expressed are sound and maintainable, it is not necessary to discuss them.

The judgment of the General Term and at the Circuit should be reversed, and a new trial granted, with costs to abide the event.

All reverse.

JOEL TIFFANY,
State Reporter.

BUSHNELL STEVENS, APPELLANT, v. JOHN HAUSER, RESPONDENT.

Ejectment—Possession of intermediate Grantee—Adverse possession—Burden of proof—Rights of Assignee in Bankruptcy—Limitations.

IN ejectment, if the title of a party, from whom, by mesne conveyances, the Plaintiff's title is deduced, be admitted or established, it is not necessary to prove his possession. Such possession is presumed, and the burden is cast upon the Defendant, if he so claims, to establish an adverse possession.

Nor, in such case, is it necessary for the Plaintiff to prove actual possession in any of the intermediate grantees through whom he derives his title, nor his own possession under the paper title.

The mere production of deeds, without any proof of possession under any one of them, does not ordinarily establish title; but, where the title of one of the grantors is admitted or established, the burden is not upon the Plaintiff of proving possession in the subsequent grantees.

A conveyance is not to be held void (under our statute declaring a deed of land held in adverse possession void) on mere proof that, at the time of such conveyance, the lands were in the possession of the Defendant.

It seems that a conveyance by an assignee in bankruptcy, under the laws of the United States, made in pursuance of a sale by order of Court, would not be void by force of our statute, even if the land was held in adverse possession.

The Act of Congress, limiting the assignee in bankruptcy to two years within which to bring actions, has no application to a cause of action aris-

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Adverse possession—Proof. 68 *N. Y.* 53; 118 *N. Y.* 288 (28 *St. Rep.* 864); 132 *N. Y.* 84 (43 *St. Rep.* 559); 167 *N. Y.* 192 (32 *Civ. Proc.* 54); 30 *App. Div.* 281 (51 *N. Y. Supp.* 940); 22 *Misc.* 470 (50 *N. Y. Supp.* 799); 28 *Abb. N. C.* 136 (19 *N. Y. Supp.* 191); 54 *Super. Ct.* 25 (3 *St. Rep.* 17; 11 *Civ. Proc.* 392).

Deeds—Champerty—Possession. 94 *N. Y.* 234; 176 *N. Y.* 457; *D.* 176 *N. Y.* 461; 89 *Hun* 128 (69 *St. Rep.* 2; 34 *N. Y. Supp.* 1086); 38 *Misc.* 17 (76 *N. Y. Supp.* 698); 12 *Hun,* 595; 18 *Hun,* 227.

Assignee—Action—Limitation. 153 *N. Y.* 481; 153 *N. Y.* 483, 484.

Assignee in Bankruptcy—Sale of real estate. 9 *Daly,* 432.

Ejectment—In name of grantor. 12 *Abb. N. C.* 122 (3 *Civ. Proc.* 408).

ing in his own favor for injury to property, or a disseizin of lands vested in him by the proceedings.

A mere tort feasor cannot, in an action against him by such assignee or his grantee, impeach the title of the assignee by proof of irregularity in the proceedings in bankruptcy, or in the order of sale.

THIS is an action of ejectment brought in the Superior Court, New York, to recover possession of a lot of land on Forty-sixth street, New York. Action commenced 22d June, 1861. Answer, a general denial. On the trial before the Court and a jury, 26th February, 1863, a verdict was ordered for the Defendant, subject to the opinion of the Court at General Term. The General Term ordered judgment for the Defendant, and made a statement of facts.

The facts, as disclosed on the trial, were: The lot was No. 182, on the Hermitage Farm. The said farm was in the actual occupation of John L. Norton, as reputed owner from 1803 to 1815 or 1816, when he let it out, and collected rent for it until 1825, when he conveyed it to Henry Lynch. Lynch conveyed certain lots, including that in question, to Clarke; Clarke conveyed to Kelly; and, in 1835, Kelly conveyed to Seaman, who, in the same year, conveyed to D. B. Talmadge.

On the 10th December, 1842, said Talmadge was duly declared a bankrupt, and W. C. H. Waddell was appointed his assignee. On the 19th June, 1861, Waddell, as such assignee, reported to the Court an application to obtain the interest of the bankrupt in said lot and another lot, for a nominal consideration, and the costs of the assignee and his counsel, the title being of no pecuniary value to the estate. On the same day, 19th June, 1861, an order was made, that the assignee should convey the interest of the bankrupt in said lots. On 20th June, 1861, the assignee gave a deed for said lots, which deed recited the decree in bankruptcy, the orders appointing the assignee, and the order to sell, and then conveyed to the Plaintiff, the Appellant, in fee, all the right, title and interest of the bankrupt in said lot 182, and another lot. It further appeared that Defendant first went into the occupation of the premises 16 or 17 years before the trial. Some years before the trial, he quitted the possession, remained absent about two years, and came

back under a lease to his wife, and was in possession when this action was brought.

The Plaintiff rested, and Defendant's counsel moved to dismiss the complaint, on the grounds: First, that there was no sufficient authority to the assignee to sell; second, that Defendant was in possession hostile to the rights of the Plaintiff during the two years allowed him to set up his right of title, and he did not do it, so that it is too late for him now to commence this action. These were the only grounds upon which the motion to dismiss was based, and it was the validity of these objections which was submitted to the General Term.

From the judgment of the General Term, ordering judgment for the Defendant upon the verdict, an appeal is taken by the Plaintiff to this Court.

John Townshend for the Appellant.
George W. Stevens for the Respondent.

WOODRUFF, J.—The verdict in this case having been taken by consent, subject to the opinion of the Court upon the questions of law, we are to take it as conceded that there is no disputed question of fact in the case.

The facts, therefore, upon which the questions of law arise, are to be found in the "statement of facts," settled by the General Term of the Superior Court, upon which the judgment appealed from proceeded.

By these it appears that, in 1825, the title to the premises in question was in one John L. Norton; that being established, his possession is to be presumed, for proof of title is primâ facie sufficient, and casts upon him who resists a claim under that title the burden of proving adverse possession. Where a party is under the necessity of proving title, it is not enough to simply produce a deed; he must show possession in the grantor, or possession accompanying the deed; without this, he proves no title. But when, as a matter of law and fact, it is found or conceded that a party named has title, that is sufficient—his possession is presumed; and the occupation by any other person is presumed to be in subordination to the legal title, unless

it appear that the premises have been held adversely to such legal title for twenty years before suit brought. (Code, § 81.)

It further appears, that the title shown to be in John L. Norton, in 1825, was deduced from him to the bankrupt Daniel B. Talmadge. It was not necessary to show that he was in actual possession, for the same reason given in respect to Norton. The Respondent attaches unwarranted importance to the fact that the bankrupt was not shown to have been in possession. The Plaintiff was not bound to show that. The onus was not on him. If it was material to the Defendant that the bankrupt was not in possession, the Defendant must prove it. Although it is sometimes necessary to show some possession or exercise of acts of ownership importing possession, in order to establish title, yet, when it is once found or established that a party has title, he who relies upon a disseizin must prove it.

The same observation applies to the assignee in bankruptcy; and it is not stated nor proved, that, when the title became vested in him, there was any adverse possession.

The defendant's possession, if it had been continuous, did not commence until four years after the title was vested in the assignee; and there was not, therefore, at that time, any subsisting cause of action to which the limitation of two years contained in the bankrupt act (5 U. S. Stat. at Large, p. 446, § 8) could apply. There was no "adverse interest," and no "person claiming an adverse interest," touching any property of the bankrupt which was vested in such assignee.

He held this real estate, upon the facts stated, in full property, and, presumptively, in full possession, and it was wholly unnecessary to prove affirmatively anything more.

Whether the assignee duly executed his trust in selling the property for a nominal consideration might be an interesting question, if creditors of the bankrupt had, in due season, called it in question, but the Defendant has nothing to do with that inquiry. He is, upon the facts stated, either a mere tort feasor, intruding upon the premises four years after the title passed to the assignee, or he went into possession, and held for about

eight years under the assignee, which is, perhaps, the legal presumption.

The cause of action, therefore, did not arise until several years after the decree in bankruptcy; and I fully agree with the views ascribed to Mr. Justice Nelson (In the Matter of Conant, not reported; MS., May 26, 1862), that the two years' limitation has no application to a cause of action which was never vested in the bankrupt, but arises out of a wrong done to the assignee himself, or to the property vested in him. This is, I think, the necessary construction of the statute, for there was no adverse interest to which it can apply; and, for wrongs done to the assignee, there is, as suggested by Judge Nelson, no reason for applying that limitation, when it concerns dealings with the assignee himself. The ground upon which four of the members of this court place the decision in Cleveland *v.* Boerum (24 N. Y. 613) is in harmony with this view.

But it is insisted, that, at the time of the execution and delivery of the deed by the assignee in bankruptcy to the Plaintiff, the Defendant was in adverse possession, and the deed to the Plaintiff is void on that ground by our statute, which enacts, that every grant of land shall be void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. (R. S., Part II., Chap. I., Title II., Art. 4, Edm. ed., Vol. I., p. 690, § 147.)

1. No such fact is found. The original possession of the Defendant is in entire harmony with the title of the assignee in bankruptcy; mere possession in another is not enough to defeat a deed. The burden was upon the Defendant to show that the possession was adverse. It is not even found that he claimed title. He may have been in under the assignee, or as a mere intruder, without claim or pretence of right.

So, as to his subsequent possession, "he came into possession under a lease to his wife." It is, at least, doubtful whether this warrants any assumption that this was adverse to the assignee; no claim of title to any one is shown.

2. But without resting upon this, I am clearly of opinion that

our statute has no application to a judicial sale; and the sale by the assignee is of that nature. It was a sale by order of the Court. (See 4 Kent's Com. 447; Tuttle *v.* Jackson, 6 Wend. 213; Truax *v.* Thorn, 2 Barb. S. C. 156; Co. Litt. 214, *a*; Frizzle *v.* Veach, 1 Dana, 211; Violett *v.* Violett, 2 id. 323; Jarrett *v.* Tomlinson, 3 Watts & Sergeant, 114; Allen *v.* Hoyt, Kirby, 221; Barney *v.* Cutler, 1 Root, 489.)

The other objections to the jurisdiction of the Court in bankruptcy, and the power to appoint a general assignee, and to order a sale in the manner stated, do not arise on the statement of facts, nor do I think they are available to the Defendant. The Court had jurisdiction of the subject-matter, and of the person of the bankrupt, and, if there was any defect or irregularity, it is to be impeached, if at all, by a direct proceeding, and cannot be availed of by this Defendant as an impeachment of the title acquired thereby.

I think the judgment must be reversed, and judgment ordered for the plaintiff, with costs.

BACON, J.—As the case is made up, it is very questionable whether it is in a form to be passed upon by this Court. At the close of the Plaintiff's evidence, it is stated that the counsel for Defendant moved to dismiss the complaint, on the ground that there was no order sufficiently authorizing the assignee to sell, and that the Defendant was in possession hostile to the rights of the Plaintiff during the two years allowed him to set up his right of title, and he did not do it, so that it is too late for him now to commence this action. Instead of granting or denying this motion upon either of the grounds stated, the case recites, that, by consent of counsel, a verdict was taken for Defendant, subject to the opinion of the Court at General Term.

When the case came into the General Term, a statement of facts was drawn up, and two conclusions of law appended thereto, as the judgment of the Court. In these, no notice is taken of the objection, that the assignee had no sufficient authority to sell. In respect to the other objection, touching the Defendant's possession, nothing is found in regard to the al-

leged hostile character of that possession, nor as to the time of its commencement, except that it was 14 or 15 years prior to the commencement of the suit, and that it consisted of his moving on to the premises, and building a house, which he subsequently sold, and was gone from the premises for two years, when the house was burned; that two years after the house was burned, he came again into possession of the premises under a lease to his wife, and was in possession when the action was commenced.

There is nothing in all this indicating any possession either under a claim of title or in hostility to that of the true owner. The Plaintiff showed a perfect paper title in himself, and was not obliged to prove possession,—certainly not against a mere squatter, which is all the possession the facts as found tend to prove in the Defendant originally. Who the lessor of his wife was, is not stated, nor does it anywhere appear in the evidence on the trial. For aught that is shown, it may have been the Plaintiff or his grantor.

The conclusions of law which the Court found were: First, that the cause of action, if any, was perfected at the date of the decree in bankruptcy; viz., on the 19th of December, 1842. Second, that more than two years having elapsed since the cause of action was perfected, and before the commencement of the action, the Plaintiff cannot recover.

Waiving the point whether there has not been a mistrial, it is entirely clear to my mind that these conclusions are erroneous. What is the bar the statute creates, and to what parties is it applicable? The bar relied upon is the one established by the eighth section of the bankrupt law of 1841, which provides that no suit at law or in equity shall be maintainable by or against the assignee in bankruptcy, or by or against any person claiming an adverse interest, touching the property and rights of property of the bankrupt, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of action shall first have accrued. The findings of the Court are, that the cause of action in this case accrued in December, 1842. If this case is within the statute,

then the limitation expired in December, 1844, and within that period Waddell, the assignee, should have brought his action, or he and his grantees would be forever barred.

But by or against whom must the action be brought? The statute says, "by or against any person claiming an adverse interest" touching the property of the bankrupt. Now, in 1844, the Defendant was not in possession of these premises, nor was any one else, so far as any testimony discloses, and no such claim is made by the Defendant's counsel. He only insists, in his points, that the Defendant was in possession adversely to Waddell & Co., Plaintiffs, for sixteen or eighteen years. In this he is manifestly mistaken. The Defendant swears he was in possession sixteen or seventeen years before the trial, which took place in February, 1863, and the statement of facts is, that he moved on to the premises fourteen or fifteen years before the commencement of the suit, which was in June, 1861. So that, at the utmost, he only went on to the premises in 1846, two years after the period of limitation prescribed by the statute. There was consequently no person claiming an adverse interest against whom any action could possibly be brought by the assignee within the time prescribed. The Plaintiff in this suit only obtained his title in June, 1861, and brought the suit immediately thereafter, so that no bar whatever can be claimed against him.

But, in my judgment, the statute in question has no application whatever to a case of this kind. In the words of Judge Nelson, in a case where he was called to interpret the eighth section: "It is obvious that the limitation only applies to suits growing out of disputes in respect to property and rights of property of the bankrupt, which came to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment. These disputes affected the assets of the bankrupt, and an adjustment of them, either by compromise or suit, was indispensable to a settlement of distribution of the assets among the creditors." This is a very just construction of the statute, and gives effect and meaning to this provision. The case of this Defendant is not at all

within its terms or intent. At the time of the assignment he set up no claim to the property involved in this suit; he had none, and pretended to none against the bankrupt, prior to the assignment; and the bar of the statute has, therefore, no application to this case. Nothing to the contrary of this was held in the case of Cleveland *v.* Boerum (24 N. Y. 613), but the opinions of the judges, given in that case, harmonize with the view of Judge Nelson, as above stated, because it distinctly appeared in that case, that the interest of the mortgagee, which was adverse to that of the assignee of the bankrupt, was not only in existence at the time of the assignment, but the mortgage was due, and was in process of foreclosure, and the assignee had actual notice of the pendency of that proceeding at the time of the vesting of the property of the bankrupt in the assignee.

The counsel for the Defendant makes the point that the sale by Waddell to the Plaintiff was void, for the reason that the Defendant, at the time of the conveyance, was in possession of the premises, holding adversely to Waddell. There are three sufficient answers to this. The point was not taken on the trial, nor passed upon by the Court in any stage of the case; it is very questionable whether the Defendant was holding adversely at that time; at any rate, the fact is neither proved nor found; and the rule that forbids the sale of real estate out of the possession of the grantor, and in that of a party holding adversely under a claim or pretence of title, does not apply to judicial sales, as was the one by Waddell in this case. (Truax *v.* Thorn, 2 Barb. S. C. 156; Hoyt *v.* Thompson, 5 N. Y. 320.)

The judgment should be reversed, and judgment absolute ordered for the plaintiff, with costs.

MASON, J.—The Court below based its decision upon the two years' limitation imposed by section 8 of the bankrupt act of 1841 (5 U. S. Stat. at Large, p. 446), and held that statute a bar to the action.

This eighth section provides, that "No suit at law or in equity shall, in any case, be maintained by or against such assignee, or by or against any person claiming an adverse inter-

est touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bandruptcy, or after the cause of suit shall have accrued." (5 U. S. Stat. at Large, 466, § 8.) This statute has no application to the case at bar, for several reasons. In the first place, the design and object of this eighth section, fixing this two years' limitation, was only intended to apply to suits in respect to property and rights of property of the bankrupt which came to the hands of the assignee, and to which adverse claim existed while in the hands of the bankrupt, and before the assignment.

Such suits, in regard to such disputed claims, affected the assets of the bankrupt, and an adjustment of them, either by compromise or suit, was indispensable to a settlement and distribution of the assets among the creditors, and this was the great object of this enactment, to facilitate this speedy settlement and distribution of the bankrupt.

In the second place, there is not a particle of evidence in the case to show that the Defendant ever set up any claim of title to these premises against Talmadge, or the assignee, Waddell. It is true, he was in the possession eight or nine years, and built a house on the premises, and sold the house, as the case states, but as far as the case shows, he did not set up any claim to the land, and, from the fact that he assumed to sell the house without the land upon which it stood, affords very strong evidence that he did not even claim the land, and especially as he left the premises on the sale of the house. The fact that he returned some two years before the commencement of this suit, and entered under a lease to his wife, is also evidence that he did not claim to own the premises. The case does not show from whom this lease was obtained, and, in the absence of all proof upon the subject, the law will indulge the presumption that he entered in subordination to the true legal title.

It seems that the Defendant first went into possession under one Ewen, by hiring the premises from him, but the case fails to show any connection of Ewen with the title, or that Ewen ever set up any claim of title, adverse to that of the Plaintiff.

The case, in short, fails to show that the Defendant or any one else claimed to hold these premises adversely, or under a title adverse to either Waddell or the Plaintiff, and consequently this two years' statute has no application. The Plaintiff showed an unbroken chain of title from 1803 down to the commencement of this action, and the presumption in law, in the absence of all proof, is, that the leases to the Defendant and his wife were in subordination to the legal title. (Code, § 81.) And, again, this eighth section of the bankrupt act, prescribing this two years' statute of limitations, never was to bar the right of entry as against a purchaser from the assignee in bankruptcy, where the bankrupt actually had the title, and the assignee sold and conveyed it by order of the Court. It was never intended to limit this action of ejectment, in such a case, to two years. The proceedings and orders of the court authorizing the assignee to sell and convey are valid, and it follows that a new trial must be granted.

It is, perhaps questionable, as the titles to real estate are regulated and controlled by State statutes, and as those statutes allow the citizen twenty years in which to bring his action, whether an act of Congress, which deprives the owner of lands of his right of entry, or limits his right to two years, can be sustained; but it is not necessary to place the case on this ground.

The construction which has been put upon section 265 of the Code, by the Court, seems to limit the right to direct a verdict subject to the opinion of the Court at General Term, to cases where the facts are undisputed and no exceptions have been taken upon the trial; and this rule has been very stringently enforced in the Supreme Court, and fully sustained in this Court, as will be seen by reference to the following cases: Bell *v.* Shibley (33 Barb., S. C. 610); Beebee *v.* Ayres (28 id. 276); Bangs *v.* Palmer (16 How. Pr. 542); Cobb *v.* Cornish (16 N. Y. 602); Gilbert *v.* Beach (id. 606; 2 Bosw. 365); Purchase *v.* Matteson (25 N. Y. 211; S. C. 15 Abb. 402; 10 Bosw. 564; 7 id. 414).

There does not seem to be much propriety in holding this a

mistrial, as regards the Plaintiff, for all the rulings in regard to evidence were in his favor, and he was allowed to give all his evidence, and consented that a verdict be directed subject to the opinion of the Court at General Term, and I do not see how the Plaintiff can have been in the least prejudiced. (City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240.)

A new trial, however, must be granted, for the reasons above stated.

Judgment reversed. JOEL TIFFANY, State Reporter.

GEROTHMAN W. CORNELL, SHERIFF, &C., RESPONDENT, *v.* JAMES F. DAKIN, APPELLANT.

Contract—Receipt for Property levied on by Sheriff—Validity.

Where a third party receipts property levied upon by the Sheriff, and thereby undertakes to return the same, and every part thereof, to the Sheriff, on demand, or to pay the judgment and Sheriff's fees, when sued for the amount of such judgment and fees, he cannot be permitted to prove on trial, that the property receipted was not the property of the judgment debtor, or was of small value.

The contract of receipt agreeing to return the property levied upon, or pay the judgment, is a valid and binding contract.

THE Plaintiff sought to recover the amount of two executions, which came into his hands as sheriff of Rensselaer county, September 17, 1859, against Francis Davis; one for $713.-60, and interest from June 17, 1859; and the other for $783.25,

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Exemption—Availability—Practice. 24 *App. Div.* 606 (49 *N. Y. Supp.* 2).

Appeal—Change of theory. 52 *App. Div.* 122 (64 *N. Y. Supp.* 1066).

Pleading—Discharge in bankruptcy—Injunction. 59 *N. Y.* 240; 71 *N. Y.* 469; 32 *Hun,* 313; 6 *Lans.* 256; 1 *City Ct.* 343.

Sheriff—Liability—Property held under levy. 94 *N. Y.* 516; 17 *Hun,* 486.

"By color of office"—Meaning of. 15 *Hun,* 491.

and interest from June 17, 1859. These executions were levied on one rosewood piano, one piano-stool, and one looking-glass, on the premises of Burrows Cure, where Cure resided, and where Davis did not reside, September 19, 1859. The sheriff, in the presence of Cure, who claimed the property at the time it was levied on, took a receipt from the Defendant herein, in the words following:

"Supreme Court. Joseph Horner *v.* Francis Davis. Execution for $783.25, and interest from June 17, 1859.

"Supreme Court. Robert F. Wilde *v.* Francis Davis. Execution for $783.60, and interest from June 17, 1859.

"The above executions were received by me, September 17, 1859, for execution. I have levied upon the following property, upon the premises of Burrows Cure, No. 10, North Third street, Troy, and in his possession, under said execution, to wit: One rosewood Chickering piano; one piano-stool; one gilt round glass.

G. W. CORNELL,
"Sheriff of Rensselaer County."

"I hereby acknowledge that I have received the above described property, so levied upon by the sheriff of Rensselaer county, from said sheriff, and hereby promise and undertake to return the same, and every part thereof, to the sheriff, on demand, or pay the above judgments, and sheriff's fees.

"JAMES F. DAKIN.

"Dated Troy, September 19, 1859."

The sheriff demanded the property mentioned in the receipt of the Defendant, September 26, 1859, and the Defendant refused to deliver it up, stating that he was indemnified by Cure. When the Plaintiff rested, the Defendant moved for a nonsuit, on the ground that the receipt was not such as the Plaintiff, as sheriff, had a right to take, which motion was denied, and the Defendant excepted. The Defendant, personally, never took the actual possession of the property, but it was relinquished by the sheriff, to him or his agent, on the occasion of executing the

receipt, and the Defendant informed the sheriff, when he demanded the property, that Cure claimed that the property was his.

After proving this state of facts, the Court refused to permit Defendant to show the following state of facts: First, that the property levied on was worth not to exceed $250. Second, that the witness Cure was, at the time of the levy, the sole owner of this property, and Davis, the Defendant in the execution, had no interest in the property whatever, Third, that the sheriff was informed of the matters secondly named, before the taking of the receipt. Fourth, that the receipt was executed at the request of Cure, the owner. Fifth, that, the Defendant never having had possession in fact, Cure, the real owner, refused to give the Defendant possession. Sixth, that Francis Davis, the Defendant in the execution, at the time of giving the receipt, had no property whatever wherewith to satisfy any portion of the executions in the sheriff's hands, and that the sheriff knew the fact at the time the receipt was given.

The evidence here closed, and the Court thereupon rendered judgment in favor of the Plaintiff, and against the Defendant, for $1,807.06 (the amount due on the executions), and the costs of suit. Judgment was accordingly perfected for that sum, which was affirmed at the General Term, and the Defendant appeals to this Court.

Upon the argument here, the Defendant's counsel makes the suggestion, that, pending the appeal in this Court, the Defendant has obtained a discharge in bankruptcy, in the United States District Court, under the act of Congress of 1867, and presents the original order of discharge. Thereupon he, first, objects to the argument of the cause, by reason of such discharge; and second, asks, in case the Court shall decide to hear the argument, and shall be of opinion that the judgment should be affirmed, that the Court direct the order of affirmance to be so entered as to protect the Defendant from the liability of having the judgment collected out of his property, or give him leave to apply to the Supreme Court for such relief as that Court may deem him entitled to, by reason of his discharge.

M. I. Townsend for the Appellant.
W. A. Beach for the Respondent.

DWIGHT, J.—The suggestion of the bankrupt's discharge can have no effect here. Such discharge cannot be considered as a bar to an action, in any stage, without being pleaded; and, if obtained too late to be pleaded, either originally, or by amendment, the remedy, it seems, is by motion for perpetual stay of execution. (Palmer *v.* Hutchins, 1 Cow. 42; Baker *v.* Taylor, id. 165.)

The questions in this case arise upon the denial of the Defendant's motion for a nonsuit, and upon the rulings of the Court upon his several offers of evidence. A nonsuit was asked for, on the ground, that the receipt given by the Defendant was void, under the provisions of the Revised Statutes relative to the powers and duties of certain judicial officers (R. S., Part III., Chap. III., Title II., Art. 2; Edm. ed., Vol. 2, p. 296, § 59) as being colore officii, and not authorized by law. But it was long since settled, that it was only *illegal* acts, done by color of office, which were declared void by this statute, and that the right of the sheriff to take such a receipt for property levied upon, was well established at common law. (Acker *v.* Burrall, 21 Wend. 605; Same case in Court of Errors, 23 id. 606.) In that case, a covenant by the receiptor to return the property on request, *or pay the debt,* was upheld and enforced.

There can be no doubt, that the motion for a nonsuit was properly denied. The case of the Appellant rests, therefore, upon his offers of evidence which were refused by the Court. And, first, on his offer to show that the property receipted for was not the property of the execution debtor, but that of the witness Cure, in whose possession it was found; and that the sheriff was informed of the facts when the levy was made. In refusing to admit evidence of these fects, the Court was certainly sustained by the amplest authority. In Acker *v.* Burrall (supra), Cowen, J., says: "The Defendant is estopped by his covenant to deny the Plaintiff's property; at least till he has

been evicted by title paramount in some third person." In Dezell *v.* Odell (3 Hill, 215) the same rule is maintained, though the Court, by Cowen, J., say: "It may be conceded, that, had the Defendant's claim been interposed at the time of the levy, and had he signed the receipt, in terms, without prejudice to his right, the question would have been open." But in the People *v.* Reeder (25 N. Y. 302), where the offer was to show that the receiptor, at the time of the levy, and again at the time of giving the receipt, protested that the property was his, the Court, by Denio, Ch.J., say: "No point is better settled, than that a party, giving a receipt for property seized by an officer, upon an execution or an attachment, is estopped from setting up against the officer that the property is his own."

Counsel for the Appellant seeks to distinguish the present case from either of the foregoing, and to relieve it from the effect of those decisions by the circumstance that here was the offer to prove the additional fact, that, at the time of the giving of the receipt, the execution debtor had no property whatever wherewith to satisfy any portion of the execution, and that the sheriff knew that fact when he took the receipt.

They urge that the ground upon which an estoppel was had in the foregoing and other similar decisions was, that, by the covenant or undertaking of the receiptor, the sheriff was induced to rely upon the levy already made, and prevented from seeking other property of the debtor, out of which to make this money he was required to collect. Whereas, were the fact such as indicated by the additional offer in this case, viz., that the debtor had no property whatever, upon which the executions could have been levied, no injury could have been done to the sheriff or the judgment creditors by inducing them to omit to look for other property. But the offer to prove that the debtor had no property seems to me to be unavailing, and the evidence to have been properly rejected. First, the offer related only to the time of the levy and the giving of the receipt. That occurred on the third day after the issue of the

executions, and there were yet fifty-seven days of the lifetime of the writs, during which the debtor might have acquired property upon which a levy might have been made, had not the sheriff relied upon the undertaking of the Defendant; and, second, whatever the effect of the evidence offered might have been, it was properly excluded, because there was no allegation in the answer to support it.

The question whether the execution debtor had any property whatever, out of which these executions might have been satisfied, if a material issue, was one of which the Plaintiff must have notice before he could be called upon to meet it. This evidence, in any view of the case, was therefore properly excluded, and the Defendant cannot avail himself of the offer to take the case out of the rule laid down in the decisions above cited.

The only remaining offer of evidence which requires to be examined, and that upon which the Defendant chiefly relies, is the offer to prove that the property receipted for was worth only the sum of $250. And here, as before, I am constrained to conclude that the evidence offered was properly excluded. The contract was to return the property or pay the executions. It was founded upon a sufficient consideration, viz., the surrender of the property levied upon to Cure. It was without ambiguity. There is no allegation or suggestion of fraud, mistake or duress. The Defendant must be supposed to have made it voluntarily, with his eyes open, with full knowledge of its meaning and effect. I know of no principle upon which he can be relieved from the liability to respond according to the plain terms of his contract.

Whatever the proof might have been as to the actual value of the property, the parties must be presumed to have estimated it at the time of the contract, at the full amount of the executions. The sheriff was, therefore, justified in making no further effort to find the property of the judgment debtor, and he became at once responsible to the judgment creditors for the full amount of the executions.

In Browning v. Hanford, in the Court of Errors (5 Denio,

586), the sheriff was sued for not collecting an execution. He proved that the property levied upon was casually destroyed by fire after the levy, and that, before the fire, he had taken a receipt for the property, in which the receiptor had agreed to return it on demand, or pay the execution and costs; and that the receiptor was of sufficient ability to respond to his undertaking. The Court of Errors held that the facts alleged were no excuse to the sheriff, but that he was liable for the full amount of the execution unless the property were destroyed by act of God or of the public enemy. The decision was just upon the ground that the liability of the sheriff should be as broad as that of the receiptor to him, and the liability of the receiptor to the sheriff was considered to be absolute and dischargeable only by act of God or the public enemy.

It is unnecessary to inquire what would have been the measure of the Defendant's liability had he failed to return only a portion of the property receipted for. That state of facts might have presented a question of some difficulty which does not arise here. In this case the receiptor returned no portion of the property, but leaves it in the possession of the person at whose request the receipt was given and by whom he declares himself indemnified, and awaits the action of the sheriff. I cannot doubt that he was liable according to the terms of his contract. Here was no case of a penalty nor of liquidated damages; it was clearly a contract to indemnify the sheriff for surrendering a levy upon property which was estimated to be of value sufficient to pay the executions levied. By taking such receipt the sheriff has been precluded from levying upon other property of the judgment debtor, and has become responsible to the judgment creditors for the amount of the executions levied. The Defendant cannot now be heard to allege that the property was of less value than the sum stipulated to be paid in case of its non-delivery.

The judgment must be affirmed.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

JAMES HENEY AND ALICIA HENEY, APPELLANTS, v THE TRUSTEEE, &c., OF THE BROOKLYN BENEVOLENT SOCIETY AND OTHERS, RESPONDENTS.

Naturalization—Retroactive Operation—Construction of Statutes.

NATURALIZATION, by virtue of the laws of the United States, has no retroactive operation to vest or confirm in the subject the title to lands which, by reason of his alienage, he could not inherit at the time of the death of the ancestor.

C. H. died May 2, 1848, seized of lands in this State. The Plaintiffs, who proved such relationship to the deceased as would entitle them to inherit, if not disqualified, were then in this country. One had declared his intention to become a citizen. AFTER the death of C. H. both were naturalized. In an action of ejectment to recover possession of such lands, *Held*, that upon the foregoing facts they were not entitled to recover, and were properly nonsuited.

The statute passed April 10, 1843, section 1, authorizing a naturalized citizen, to whom lands would have descended if he had been a citizen at the time of the death of the person last seized, to continue to hold the same in like manner as if he had been a citizen at the time of such descent cast, applied only to those who were then naturalized citizens.

APPEAL from judgment for the Defendants, dismissing the Plaintiff's complaint, entered at the General Term of the Supreme Court, in the Second District; exceptions having been taken at the trial and ordered to be heard in General Term, and judgment in the meantime suspended.

The action is brought for the recovery of the possession of real estate in Kings county, of which it was admitted on trial Cornelius Heney died seized, on the 2d day of May, 1848, and of which the defendants are in possession.

The complaint alleged that at the death of Cornelius Heney, the Plaintiffs and Christopher Heney were his only next of kin and heirs-at-law surviving, and as such then became seized of an estate of inheritance in fee-simple of and in the premises, and that Christopher Heney died in 1853, and by his last will

Descent—Aliens. 80 *N. Y.* 178; 13 *Hun,* 312; 91 *App. Div.* 313 (86 *N. Y. Supp.* 627; 14 *Ann. Cas.* 425).

devised the premises to the plaintiffs, who are also his only next of kin and heirs-at-law.

The answer of the Defendant denies the seizure of the Plaintiffs, denies that they are the next of kin or heirs-at-law of Cornelius Heney, and avers the making of a will by the latter, and a devise of the premises, to the Defendants, who are a corporation, &c.

On the trial, the seizure of Cornelius Heney, who purchased in 1806, and his death, May 2, 1848, were admitted, and also that the Defendants had been at all times from the death of Cornelius Heney, and were still, in the possession of the premises.

It also appeared that the said Cornelius Heney and the Plaintiffs were natives of Great Britain and Ireland. That the said Cornelius was duly naturalized, and became a citizen of the United States in the year 1795. That on the 21st day of December, 1840, the Plaintiff, James Heney, declared his intention to become a citizen, and on the 6th day of November, 1848, he was duly naturalized. That on the 2d day of July, 1851,, the Plaintiff, Alicia Heney, was duly naturalized.

The Plaintiffs gave evidence tending to prove that the Plaintiffs bore such a relationship by consanguinity to the said Cornelius Heney, that if not disqualified from inheriting, or from recovering in this action by reason of their alienism, at the time of his death they were the heirs-at-law and the next of kin of Cornelius Heney, deceased, and rested.

The Defendants thereupon moved to dismiss the complaint, on the ground that the Plaintiffs were aliens at the time of the death of said Cornelius. The motion was granted.

The exceptions were ordered to be heard at the General Term, in the first instance, and at General Term a judgment for the Defendants was rendered.

The Plaintiffs appealed to this court.

E. W. Stoughton and William C. Barrett for Appellants.
Chas. O'Conor and T. J. Glover for Defendants.

WOODRUFF, J.—At the time of the death of Cornelius Heney, who died seized of the premises in question, the Plaintiffs were aliens. It is not claimed that as such they could inherit and hold lands in this State.

The claim of the Appellants is, that having become naturalized citizens of the United States after the decease of the said Cornelius, they became entitled to take and hold the real estate whereof he died seized.

That is claimed upon the grounds, viz.:

First, That 'upon general principles naturalization has a retroactive operation, which vested or confirmed in them the estate which, but for their alienism, would have descended to them in fee, at the death of Cornelius Heney, had they then been citizens of the United States.

Second, That the statute of the State, passed April 10, 1843, entitled "An Act to enable resident aliens to hold and convey real estate" (Laws of 1843, Ch. 87), entitled them to take and hold the lands as heirs-at-law of the person last seized.

The first point involves this general result, viz.; that whenever the owner of real estate dies without heirs capable of inheriting, the State holds the title of escheat, subject to the contingency that at some future day, some person or persons, now aliens, but otherwise entitled to inherit, may come to this country, and by becoming naturalized, divest the title of the State.

Certainly, there is no common law, rule or authority, for such a proposition; for naturalization is not of the common law. The English law-writers who speak of the retroactive effect of naturalization, therefore, speak of the express or constructive effect of the Acts of Parliament, by which, in special cases, the disability of alienism is removed, in terms which are deemed to involve the installation of the subject in the same condition in the eye of the law, as if he were native born.

It is clear, I think, that we are to seek for the legal effect of naturalization in the statutes by which it is authorized, and in such legislation as has been had in our own State on the subject. It is not to be determined upon a mere definition of

the term naturalization, but if it were, it would be most logical, and most consistent with sound principle to say, that the subject, when naturalized, began to have capacities pertaining to citizenship available for the future, and only in such future.

If it were conceded that the Congress of the United States have power to declare the effect of naturalization, so as to give to the subject thereof all the rights, retroactively as well as prospectively, which he would have, or would have had, if native born, of which in respect to real estate, within the State, the transfer, transmission and descent of which is peculiarly a matter of state policy, there is great room for doubt, I think it clear that the naturalization laws of the United States admit of no such construction.

Under those laws the applicant is admitted to citizenship upon complying with certain prescribed conditions. He "becomes" a citizen. He is put in a condition, or acquires a character, in which he can have and enjoy all the rights and privileges which by law pertain to citizenship, and that is all. But all this is, according to the plain reading of the laws, prospective. His capacity then begins to be useful or efficient to enable him to have and enjoy whatever pertains to his new character.

This view of the subject is well illustrated and explained by the Chancellor and by Senator Verplanck, in Priest v. Cummings (20 Wend. 338), with whom I fully concur on the point.

Whatever rights aliens have, or may acquire, in real estate within our State, therefore, depends upon our own legislation, and not upon any idea that naturalization operates, per se, to give the rights of a native born citizen by relation back to the birth of a subject.

Indeed, the case which I have referred to above (20 Wend. 338), in the Court of Errors, seems to me in pdinciple to settle the question. There, a naturalized widow claimed dower in lands held by her husband during coverture, but disposed of before her naturalization, and claimed for her naturalization a retroactive operation. There, it is true, the rights of a

grantee of her husband may be said to have intervened; but the opinions of the Court do not rest the case upon the past, nor do I think it could have, in sound principle, been made to turn upon that circumstance. It is placed upon the broad ground, that neither by force of the naturalization laws, nor by our statute of 1802, had her naturalization any retroactive operation. She, not having at any time while her husband was seized, capacity to take, had no inchoate right of dower, and naturalization did not retroact to work such a result.

Naturalization extinguises the original disability, or it does not. If it does, the Courts cannot assume to restrain its operation. And the fact that the lands have in the meantime been conveyed to a third person, would only lead to this. If subsequent naturalization retroacts so as to invest the subject with such rights as he or she would have if native born, the purchaser takes subject to that contingency. And there is no warrant for the assumption that the title of the State by escheat can be divested by subsequent naturalization of an alien heir or widow, unless it is found in our own statutes on the subject.

The case of Kennedy *v.* Wood, in the Supreme Court (20 Wend. 230), is at war with the idea so earnestly and ingeniously pressed by the counsel for the Appellant. There the Plaintiffs claimed to recover as heirs-at-law (a brother and two sisters) of James Kennedy, deceased. One of the Plaintiffs, the brother, was naturalized in 1834, but after the death of James Kennedy, who died in 1833. They were held not entitled to recover, because incapable of inheriting at the time of such death.

The various statutes of this State, heretofore passed, are reviewed, and no ground was found for sustaining their claim, though the Plaintiffs had been residents since 1805. And it was not suggested that the naturalization of the brother (Alex. Kennedy), after the death of James, placed him, in this respect, in any better situation than his sisters.

These cases show that the opinion of the Court in The People *v.* Conklin (2 Hill, 67), is not, in reference to the point

under consideration, to be regarded as a dictum unsustained by authority. It is there held that the capacity to take by descent must exist at the time the descent happens. It is there conceded that an alien may take by purchase, subject to the right of the State to recover the land after office found, and that if naturalization be had before office found, his title will be thereby confirmed. That a conveyance or devise should be deemed to operate technically as a transfer of the title to the alien, is in harmony with the fact that the State, seeking to avail itself of the escheat, must itself rely upon the conveyance or devise as a transfer of the title; and if, therefore, the grantee or devisee be naturalized before office found, it may be true that because he is then capable of holding the title so conveyed, and he cannot therefore be found an alien, the State cannot therefore enforce the escheat.

In this way the naturalization may, in a loose sense, be said to confirm his title. But this reasoning can have no application to a descent which is by operation of law. The law casts no title on an alien, and there is no need of a finding by inquisition of office to entitle the State to recover. Hence it is also said in the case last cited, that the rule is "otherwise where the party claims by descent" to be naturalized after descent cast. (See also Jackson *v.* Green, 7 Wend. 333.)

It is not quite easy to perceive how the argument for the Appellant can be reconciled with the express provisions of the Act of 1825 (re-enacted, see Part II., Chap. I., Tit. I., Art. II., R. S.), which, after providing that an alien, who had or may come into the State, may make and file a deposition or affirmation that he is a resident, intends always to reside in the United States, and become a citizen as soon as he can be naturalized, and that he has taken the incipient measures (in declaring his intention) as the laws of the United States require, &c., may take and hold, and sell lands, &c., for six years, declares that "such alien shall not be capable of taking or holding any lands or real estate which may have descended . . . . to him previously to his having become such resident and made such deposition or affirmation as aforesaid." There is

no pretence that the Plaintiffs have filed such a deposition or affirmation, and they were aliens when the lands descended.

It follows, that unless some statute of this State entitles the Plaintiff to recover, the judgment for the Defendants was not erroneous. The statute relied upon is that of April 10, 1843 (Chap. 87, Laws of 1843), as above stated, and the section on which the Plaintiffs rely is the first, which reads as follows: "§ 1. Any naturalized citizen of the United States who may have purchased and taken a conveyance for any lands, or real estate, within this State, or to whom any such lands or real estate may have been devised, or to whom they would have descended if he had been a citizen at the time of the death of the person last seized, before he was qualified to hold them by existing laws, may continue to hold the same in like manner as if he had been a citizen at the time of such purchase, devise, or descent cast; and all conveyances, by deed or mortgage, heretofore made by such naturalized citizen are hereby confirmed."

Before considering the construction of this section, it is quite pertinent to observe, under the previous point above discussed, that if the claim of the Appellants was correct, this statute was idle and unnecessary. For if naturalization, per se, retroacted, and vested or confirmed title in the person naturized whenever a conveyance or devise had theretofore been made to him, or descent been cast which would entitle him, if a citizen, it was quite superfluous for the Legislature to enact that he might continue to hold, &c.

To recur to the actual operation of the statute itself. In the first place, every word of the section speaks of the past, and not of the future. It describes a naturalized citizen "who may have purchased," to "whom real estate may have been devised," to whom lands "would have descended if he had been a citizen at the time of the death of the person last seized," and this as having happened "before he was qualified to hold by existing laws," thus assuming that he is now, at the time when the Legislature speaks, qualified by naturalization.

Why should these terms, indicating sole reference to what

has already happened, have been so carefully related, if the future was also contemplated? In giving its construction, we may not overlook the ease with which both past and future cases might have been provided for, if so intended. Thus, "who may have purchased, or who shall hereafter purchase, or to whom lands have been or shall be devised, or to whom lands would have descended or would descend if he had been, or were, a citizen, &c., before he was, or shall be naturalized," &c. The concluding sentence makes it most clear that the Legislature had the past, and not the future, in view. Conveyances by the persons therein described, "heretofore made, are hereby confirmed."

The reading of the section seems to me quite too plain to be called in question. As pertinently stated by both Judge Brown and Judge Emott in the opinions below, the persons spoken of are not those who may thereafter be, or become naturalized citizens, but those who then were naturalized. The evil consequences of the construction contended for, to let in after any lapse of time from the death of the person seized, any person coming and obtaining naturalization, forbids the construction contended for.

Liberal as the State has uniformly been in waiving of its claim to escheat in favor of resident aliens who become citizens, or even avow their intention to become citizens, under such forms as seemed expedient, it has always been the policy of the State to hold the subject in its own control. When it sees fit to grant to, or confirm titles in immigrant citizens, it has done so in view of then existing facts and circumstances, involving no such uncertainty or looseness in the titles to real estate, as to have it unknown through the lapse of indefinite years whether persons born in other countries will or will not inherit.

But still more conclusively, I think, the reading of the whole statute shows that the Legislature, in the first section, referred to persons then actually naturalized.

The first section speaks entirely of "any naturalized citizen who may have purchased," &c., "to whom lands would have descended," &c. The second section declares that "any alien

who being at the time an actual resident of the United States, who may have heretofore purchased and taken a conveyance," &c., or "to whom they may have been devised, or to whom they would have descended," &c., and "any such alien who may hereafter purchase," &c., "or to whom the same may be devised, or to whom the same would descend," &c., "and who have already filed, or shall within *one year* from the passage of this act, or within one year from the time of such purchase, devise, or descent cast, file the deposition or affirmation" required in a former statute, "may hold or convey such lands or real estate during the term of five years from the passage of this act," &c.

Now it is plain from this that the Legislature meant to provide for two classes, viz., those who were already naturalized, and those who were then aliens; and yet if the first section applied to persons then aliens, but thereafter to be naturalized, the second section was hardly necessary.

But it shows very clearly that in passing the act the Legislature used all the words not only intelligently, but with discrimination between the past and the future. And when they intended to provide for the future, they did employ future terms, leaving nothing to construction. And they preserved as theretofore their policy of retaining in their own control the circumstances of the future by making this statute, in so far as it was applied to claims, or devises, or to purchases or descents thereafter made or occurring, a temporary one, operating for five years from its passage.

The Plaintiffs can gain no strength from this act. They were not naturalized citizens when the act was passed. The descent had not been cast at the date of the act. They were then aliens, but never complied with the provisions of the second section.

The judgment of the Supreme Court must, I think, be affirmed.

Affirmed.

JOEL TIFFANY,
State Reporter.

ALFRED WEBSTER, RESPONDENT, v. THE HUDSON RIVER RAILROAD COMPANY, APPELLANTS.

Contributory negligence—Imputation.

Where a Railroad Company has been guilty of negligence in running into a passenger-car of another Company, and injuring the passengers, in an action for damages against said Company, it is not competent for the Defendant to prove that the Company whose passengers were injured by its carelessness, was likewise guilty of negligence.

THE Defendant is a railroad corporation, engaged in the transportation of freight and passengers, by steam power, along the east shore of the Hudson river, between New York and Albany.

The Plaintiff, on the 19th of April, 1860, was a passenger on a *through ticket* from the city of New York to East Chatham, by steamboat to Hudson, and from Hudson to Chatham by the Hudson and Boston Railroad. The testimony shows that the Hudson and Boston Railroad is a railroad starting from the steamboat dock in Hudson, seven hundred or eight hundred feet west of the Hudson River Railroad track, and runs eastwardly directly across the Hudson River Railroad track. This road did a very large business west of the Hudson River Railroad. Their track had been laid and their business had been going on nineteen years.

When the Plaintiff arrived by the boat at the Hudson steam-

Negligence—Intervening and proximate causes. 45 *N. Y.* 631; 64 *N. Y.* 147; 66 *N. Y.* 14; 69 *N. Y.* 483; 77 *N. Y.* 54; 178 *N. Y.* 124; 3 *Hun,* 198; 5 *Hun,* 535.

Negligence—Concurrent—Joint and several liability. 13 *Hun* 88; 65 *Hun,* 192 (47 *St. Rep.* 374; 20 *N. Y. Supp.* 28); 71 *App. Div.* 444 (75 *N. Y. Supp.* 869); 79 *App. Div.* 126 (80 *N. Y. Supp.* 117) 20 *Misc.* 23, 34 (45 *N. Y. Supp.* 323, 324); 5 *T. & C.* 66; 15 *Abb. N. C.* 181; 16 *Daly,* 316 (32 *St. Rep.* 612; 11 *N. Y. Supp.* 80).

Contributory negligence—Imputation. 17 *Hun,* 37; 65 *Barb.* 155; 5 *Daly,* 457.

boat dock, on the morning of April 19, 1860, between four and five o'clock, he found the train of the Hudson and Boston road standing within fifty feet of the dock to receive him. He was called upon by the servants of the road to enter, and he and the other passengers got into the baggage-car to ride eastward to where the train was more fully made up. The train at this time consisted of an engine, a tender, a freight-car, and a baggage-car. The train started from the usual point and at its usual time, and, while crossing the track of the Hudson River Railroad, a train on that road, coming from New York toward Albany, struck the baggage-car in which the Plaintiff had been placed by the employees of the Hudson and Boston road, and seriously injured the Plaintiff.

The negligence of the Defendants was established by the finding of the jury, and is not in question here. The only questions arise upon the refusal of the Judge to charge that, if the Hudson and Boston road, on whose train the Plaintiff was a passenger, was also guilty of negligence, the Plaintiff cannot recover against the Defendants. The Defendants requested the Judge to charge the jury, "that if the negligence of the Hudson and Boston Railroad Company, its agents or servants, caused, or contributed to cause, the collision, and consequent injury to the Plaintiff, he cannot recover," which was refused, and the Defendants excepted. The same principle was presented in several other different requests, which the Judge also refused to charge. The jury found a verdict for the Plaintiff, the judgment upon which was affirmed by the General Term. The Defendants now appeal to this Court.

J. H. Reynolds for the Appellants.
M. I. Townsend for the Respondent.

HUNT, Ch.J.—The Plaintiff was properly in the cars of the Hudson and Boston Railroad Company, on his way to Chatham. It is not pretended that he was guilty of any personal negligence, or that it was in his power, by any means, or in any degree, to have prevented the collision by which he was

injured. Like every passenger in a train of cars propelled by steam, he was passive in the hands of the railroad company; unable to aid, if aid was useful, unable to delay or hasten a train, incompetent, and not permitted, to regulate or examine its machinery. His personal safety was exclusively under the control of others. Of the company to whose care he had intrusted himself, he was entitled to ask the very highest degree of care and attention; of all others, that ordinary care which all prudent people are bound to bestow in the management of their affairs. The jury have found that the Defendants were deficient in the use of such care, and I see no reason why they should not respond in damages. The "imputation" to the Plaintiff of the negligence of another is based upon no sound principle. The fact that the Boston road was also guilty of negligence, furnishes, in law or morals, no excuse for the negligence of the Hudson River Company, and no reason why they should not respond in damages. (Sheridan *v.* Brooklyn and Newtown R. R. Co., 36 N. Y. 39.)

In Chapman *v.* The New Haven R. R. Co. (19 N. Y. 341), and in Colegrove *v.* The N. Y. & N. H. and N. Y. & Harlem R. R. Cos. (20 id. 492), the question now before us was distinctly presented, and in each case was decided in favor of the Plaintiff. In the case of Brown *v.* N. Y. C. R. R. Co. (32 N. Y. 597), the question was somewhat discussed, but it did not exist in the case. There, the Justice at the Circuit had charged that the Plaintiff was responsible for the negligence of the driver of the stage in which he was riding, and the jury had found that there was no negligence on the part of the driver. The question of imputed negligence could not, therefore, have been decided in that case. The case of Thorogood *v.* Bryan (8 Com. B. 115), was cited in several of the above cases. The facts in that case show a clear question of personal negligence to be submitted to the jury. Instead of waiting for the driver of the omnibus in which he was riding to draw up to the sidewalk, and there to permit him to alight, as he had a right to require, the Plaintiff got out in the crowded street, and was at once, or soon, struck by an approaching

omnibus. If there was negligence, the Plaintiff was the negligent party, although the driver of his omnibus may have been negligent also in not stopping at once, or in not driving to the sidewalk. This case is no authority for the decision of a case like the present.

Upon principle and authority, this case was rightly decided below, and the judgment should be affirmed.

Judgment affirmed.

JOEL TIFFANY.
State Reporter.

CONRAD A. CROUNSE AND WILLIAM CROUNSE, RESPONDENTS, *v.* EBENEZER A. FITCH, IMPLEADED WITH P. A. CROUNSE, APPELLANT.

Evidence—Declarations.

ACTION upon a promissory note. Defence, that Fitch was the surety of P. A. Crounse. That while the latter was responsible Fitch requested the holder, after the note became due, to proceed and collect it of the principal.

That the holder neglected so to do until the principal became insolvent.

Second, that the note had been paid by the principal.

Upon the trial at Circuit, numerous exceptions were taken by the Defendant to the rulings of the Judge, upon the admissibility of evidence, which appear in the opinion.

The jury rendered a verdict for the Plaintiffs, upon which judgment was rendered. After affirmance by the General Term, the Defendant, Fitch, appealed to the Court.

Auction sale—Evidence of value. 78 *N. Y.* 145; 83 *N. Y.* 371; 7 *Abb. N. C.* 175; 20 *Misc.* 773 (3 *N. Y. Supp.* 293); 5 *Lans.* 305; 20 *St. Rep.* 773 (3 *N. Y. Supp.* 293).

Witness—Impeaching. 46 *How. Pr.* 141.

Tremain & Peckham for Appellants.
Samuel Hand for Respondents.

GROVER, J.—No exceptions having been taken to the charge of the Judge to the jury, that must be assumed to have been correct. This leaves for examination by this Court only the exceptions taken by the Defendant to the rulings of the Court upon the competency of evidence.

In considering these exceptions, the questions in issue must be kept in view. These were: First, whether, after the maturity of the note, the surety, Fitch, while his principal, Crounse, was solvent, requested the holder to proceed and collect the note of the principal, and whether the holder delayed to prosecute until the principal became insolvent; and second, whether the note had been paid by the principal.

Upon the first issue the only question made, as appears by the case, was whether the principal debtor, Crounse, was solvent at the time the request was made by Fitch to collect the note of him. This, it appears, led to an inquiry as to the value of the property owned by him at the time of the request (Dec. 1856).

For the purpose of showing the value of a portion of the property (certain hotel furniture), the Plaintiff offered to prove what it sold for at a public sale in March, 1857. The Judge held the evidence competent, to which the Defendant excepted. I think this ruling was correct.

It was held in Campbell *v.* Woodworth (20 N. Y. 499), that the price for which goods sold at public auction was competent evidence for the consideration of a jury upon the question of the value of the goods. In this case the question was as to the value of the furniture in December. The sale was in March thereafter. The difference in time is not so great, when the kind of property in question is considered, as to justify the exclusion of the evidence. If anything had occurred between December and March materially affecting the value of the furniture, it was competent for the Defendant to

show it, and thus enable the jury upon all the evidence to determine its value in December.

Upon the issue of payment by the principal, Crounse, the case shows that the only question at the trial was whether, when the Plaintiff paid Ogsbury, the holder, the amount of the note, he did it as purchaser of the note from him, or whether he loaned the money to the principal, and the note was paid by him therewith to the holder.

Upon this issue it is manifest that all statements made by the principal to the holder of the note, not in presence of the Plaintiffs, or either of them, and of which they had no knowledge at the time they advanced the money, were inadmissable to affect their rights.

The Judge was right in excluding the statements made by the principal to Ogsbury, that he would borrow the money of the Plaintiffs and pay the note. There was nothing tending to show that either of the Plaintiffs knew anything of these statements. They formed no part of the res gesta. The understanding of Ogsbury as to the effect of the transaction was properly excluded. The Plaintiffs knew nothing of this. The rights of the Plaintiffs must be determined by what was said and done at the time they paid the money.

At first view it would appear that Ogsbury, the agent, who transacted the business with the Plaintiffs for the holder, should have been permitted to answer the question whether he delivered the note to the Plaintiffs, and whether he sold it to them. But the case shows that he was permitted to and did testify to all that was said and done on that occasion. From these latter facts the effect of the transaction was to be determined. The witness had no right to express any opinion upon their effect after testifying fully to all that was said and done. An answer to the question would have been nothing more.

The declarations of the principal to Ogsbury, the agent, after the completion of the business, as they were leaving the store, were not admissible. They were no part of the res

gesta. They were not made in the hearing of the Plaintiffs. Their being made directly after the completion of the business, does not affect the question. Whether made minutes, hours, or days after, they were equally incompetent. The evidence that the principal said the note was paid, was properly excluded. He was introduced as a witness by the Plaintiffs, and examined as to his property and the incumberances thereon, and the debts owing by him, but gave no evidence as to whether the note had been paid. The statement, therefore, did not contradict any testimony given by him. When the Defendant, upon cross-examination, inquired of him whether he had made such statements, he was concluded by his answer that he had not. The statement, if made, was collateral to any testimony given by the witness. The witness could not be impeached by proof that he had never made the statement. This can only be done when the statement tends to contradict the testimony of the witness.

The evidence that the Plaintiffs, in a conversation between themselves, after being applied to for the money, said one to the other that it was best to purchase, was not competent, and the Defendant's exception thereto was well taken. On this ground the judgment must be reversed and a new trial granted, unless it clearly appears from the case that the Defendant could not have received any prejudice from the testimony. It will so appear if, after striking out this testimony, the evidence was such that it would have been the duty of the Judge to direct the jury to find that the Plaintiffs purchased the note and did not lend the money to the principal to pay the note to the holder. There was no conflict in the evidence upon these points. It was, in substance, that the agent of the holder and the principal went to the store of the Plaintiffs together, and there Peter Crounse, the principal debtor, told one of the Plaintiffs that the agent had a good note and wished him to cash it. That he declined. That shortly after, this Plaintiff had a short conference with the other Plaintiff, and upon his return said perhaps he could borrow the money. That he

then went out and shortly returned with money in his hand. That they then cast the interest on the note, and this Plaintiff paid him, the agent, the amount, and left the note on the counter, and went away with the money.

This evidence conclusively proves a purchase of the note; and a verdict negativing the purchase and finding it was a loan to Crounse, the principal, and a payment of the note by him, would have been set aside as against evidence. The fact that Crounse, the principal, the night before, sent the agent of the holder to the Plaintiffs to see if they would not cash the note, and that he went and told them that he had been sent by him to see if they would cash it, does not alter the case.

Had the Plaintiffs given him the money then for the note, the only conclusion to be drawn therefrom would have been that they purchased it. There was not the slightest proof that they loaned the money to Crounse, the principal debtor. In the absence of the testimony in question, the only conclusion that could have been drawn from the remaining proof was, that the note was purchased by the Plaintiffs. The Defendant could not have been prejudiced by the error in receiving it.

The judgment must be affirmed.

JOEL TIFFANY,
State Reporter.

WILLIAM ALGEO, APPELLANT, v. WILLIAM E. DUNCAN, RESPONDENT.

New Trial—Power of Judge at trial to entertain motion for—Insufficient evidence.

Where, on the trial of an action upon a promissory note, to which the defence is infancy, the Defendant by clear and uncontradicted evidence establishes the defence, but the jury disregard the evidence and find for the Plaintiff, the Judge may entertain and grant a motion upon his minutes to set aside the verdict and order a new trial.

The fact that, but for such prooff, the Plaintiff who produced the note and read it in evidence would have been entitled to the verdist, did not deprive the Judge of jurisdiction and power to make such order.

Whether such power exists independently of the Code of Procedure, or is to be derived from that section of the Code (264), which authorizes a Judge "to set aside a verdict and grant a new trial for insufficient evidence," it exists and was, in the case stated, properly exercised.

APPEAL from order of General Term of the Supreme Court in the Second District, affirming order setting aside a verdict for the Plaintiff, and granting a new trial.

The action is upon a promissory note for $478.80, dated October 1, 1853, made by the Defendant, payable twelve months after date, to order of Samuel Cox, and endorsed to the Plaintiff.

The answer stated several grounds of defence, but on the trial the note was read in evidence, and the balance thereof unpaid was agreed upon, and it was admitted "that the defence

Appeal—Review of verdict. 88 *Hun,* 113 (68 *St. Rep.* 537; 34 *N. Y. Supp.* 615); 9 *Misc.* 60 (59 *St. Rep.* 691; 29 *N. Y. Supp.* 12); 13 *St. Rep.* 717; 38 *St. Rep.* 472 (14 *N. Y. Supp.* 757).

New trial—On minutes—Weight of evidence. 40 *N. Y.* 555; 79 *N. Y.* 511; 7 *Hun,* 344; 9 *Hun,* 125; 12 *Hun,* 205; 14 *Hun,* 46; 16 *Hun,* 419; 21 *Hun,* 388; 72 *Hun,* 427 (55 *St. Rep.* 174; 25 *N. Y. Supp.* 155); 2 *Abb. N. C.* 299; 8 *Abb. N. C.* 395.

was solely founded upon the plea of infancy," and the Plaintiff thereupon rested his case.

The Defendant then, by his own testimony, and by that of an uncle, proved that he was born in 1833, and to this there was no contradiction. The cross-examination of the Defendant tended to show that in 1852 and 1853 he was in the feed and flour business as a partner with persons named Everitt and Cox, under the firm of Everitt & Co.

The Judge, on the trial, stated to the jury that if the Defendant had established that he was under the age of twenty-one when he made the note, and the Plaintiff had shown no exception taking the case out of the general rule, the Defendant was entitled to a verdict, but he left it to them to say which of the parties were so entitled.

The jury found a verdict for the Plaintiff. The Defendant thereupon moved upon the Judge's minutes for a new trial. The Plaintiff objected, on the ground that in such a case the Judge had no authority to hear a motion for a new trial upon his minutes.

The motion was nevertheless entertained and granted. On appeal, the order was affirmed in the General Term; and thereupon the Plaintiff stipulated and appealed to this Court.

Philip S. Crooke for the Appellant.
George Thompson for the Respondent.

WOODRUFF, J.—The 264th section of the Code of Procedure provides, that "The Judge who tries a cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions or for insufficient evidence, or for excessive damages."

I am not willing to concede that, if no such provision were found in our Code, there is any want of power in the Judge presiding at the trial of a cause to set aside a verdict rendered by a jury, when it is palpably against law, or wholly and clearly unwarranted by the evidence, or where it is rendered in the face of explicit instructions to the contrary. According

to the argument urged here, if the Judge had on this trial instructed the jury, in express terms, to find for the Defendant, as he might properly have done, and the jury had nevertheless, through prejudice, partiality, or mistake, violated the instructions and found for the Plaintiff, the Judge could not have set the verdict aside, but was bound to put the Defendant to the delay and expense of making a formal case, and bringing it to a hearing at a subsequent term.

Nor do I think that the provision of the Code above cited by any implication limits or abridges the power which would exist had it not been enacted. It is, however, sufficient to say, that the reasonable interpretation of the section cited warrants the motion which was here made.

The argument on behalf of the Appellant, ingeniously presented and skilfully urged by his counsel, is, that whenever a Plaintiff has made a primâ facie case, so as to put the Defendant upon his defense, a verdict for the Plaintiff cannot be said to be upon "insufficient evidence," however fully or conclusively the defense relied upon may be established, or however the Plaintiff fails to disprove or avoid the legal effect of such defence. That in such case the verdict may be against evidence, but cannot be deemed to be rendered upon "insufficient evidence," and therefore however clear it may be that, on a case made and brought to a hearing, the verdict must be set aside, the Judge at the Trial Term has no jurisdiction to entertain a motion upon his minutes and set the verdict aside "for insufficient evidence." In the present case it was admitted that the only defence was infancy. There was no issue upon the making of the note in question, or the fact of the transfer thereof to the Plaintiff. The answer of the Defendant admitted both. True, the note was read in evidence by the Plaintiff, but neither its making nor endorsement to the Plaintiff was in issue.

The issue was upon the defence of infancy, and that defence was fully and completely established by two witnesses,

and yet, without any evidence either to contradict or avoid the defence, the Plaintiff had a verdict.

That is to say, upon the trial of an issue as to which the Plaintiff had no evidence which could warrant the jury in disregarding the defence which the Defendant had pleaded and proved, and the truth of which alone they were to try, they arbitrarily found for the Plaintiff. It is clear, I think, that the verdict in this case had no sufficient evidence to support it, and, therefore, within the most precise, literal, and technical meaning of the Code, could properly be set aside "for insufficient evidence." It was not a case in which the Plaintiff had thrown some doubt, however slight, upon the truth of the defence, nor one in which he had given some slight evidence in avoidance of its legal effect, so that the motion to set aside could be regarded as founded on the alleged preponderance of the Defendant's proof, but the bold case of a trial of a single issue, in which the Plaintiff had a verdict without any testimony in conflict with an established defence.

In this view it is not material that, if the Defendant had offered no testimony, the Plaintiff would have been entitled to an assessment and a verdict; the verdict which he had upon the issue actually tried was without evidence on his behalf to support it.

Nor, in my judgment, is the right of the Judge to entertain such a motion upon his minutes rendered less clear by calling this verdict a verdict against evidence. True, it is a verdict in the face of clear and uncontradicted proof, establishing the issue in the Defendant's favor, but it is, nevertheless, a verdict without sufficient evidence to support it.

The term "insufficient evidence," as used in the Code, should be construed with reference to the actual issue upon which the jury were to pass, and not less with reference to the whole state of the case made by the adverse party. Suppose the sole issue in a given case was upon the plea of release. The Defendant, having the affirmative of that issue, produces and proves a release under the hand and seal of the Plaintiff, and

the latter gives no evidence in avoidance of the release sufficient to warrant the submission of any question to the jury, and yet the jury find for the Plaintiff. It is true, that such a verdict would be against the Defendant's conclusive evidence; but it is equally true, that such a verdict is without any sufficient evidence.

The power in question is to be cautiously exercised, and it is left to the sound discretion of the Judge whether he will act upon his own minutes, and the views which, while the proceedings on the trial are fully in his mind, and fresh in the mind of counsel, or whether there is so much of doubt, that the case should stand over for more deliberate and careful scrutiny upon a case which shall bring all the evidence again before him; but the power is a useful one, to be exercised in a clear case, and a large saving of expense and delay to both Plaintiff and Defendant.

The order appealed from should be affirmed, and, in accordance with the stipulation upon which the Plaintiff has brought his appeal to this Court, judgment absolute for the Defendant should be rendered.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

GEORGE W. DICKSON, AN INFANT, &c., RESPONDENT, v. LUTHER J. McCOY, APPELLANT.

Negligence—Running of a Horse at large—Viciousness.

The owner of a young horse, which is accustomed to run and kick from playfulness, when at large, is liable for any injury inflicted by his gambols or kicking, in the public street of a city, when permitted by his owner to go at large therein. It presents a question of negligence on the part of the owner, and not one of viciousness on the part of the animal.

THIS was an action for injury to the Plaintiff by the horse of the Defendant. The Plaintiff, a child of ten years, was passing the stable of the Defendant, upon the sidewalk of a populous street in the city of Troy, when the Defendant's horse came out of the stable, going loose and unattended, and, in passing, kicked the Plaintiff in the face. The complaint alleged that the horse was "of a malicious and mischievous disposition, and accustomed to attack and injure mankind;" also, that the Defendant "wrongfully and negligently suffered the said horse to go at large in and upon the public streets," etc.

The proof as to the disposition of the horse was only to the effect that he was young and playful, and, when loose in the street, was accustomed to run and kick in the air, but had never been seen to kick at any person. The Defendant moved for a nonsuit, on the ground that there was no proof that the horse was vicious; which was refused. The Defendant also requested the Court to charge that there was no proof that the

Animals—Viciousness—Scienter—Negligence. 77 *Hun,* 577 (60 *St. Rep.* 452; 28 *N. Y. Supp.* 1024); 85 *Hun,* 91 (66 *St. Rep.* 72; 32 *N. Y. Supp.* 688); 86 *Hun,* 2 (66 *St. Rep.* 711; 33 *N. Y. Supp.* 109); 46 *App. Div.* 414 (61 *N. Y. Supp.* 802); 59 *App. Div.* 41 (69 *N. Y. Supp.* 98); 46 *App. Div.* 166 (61 *N. Y. Supp.* 758); 21 *Misc.* 63 (46 *N. Y. Supp.* 939); 26 *Misc.* 795 (56 *N. Y. Supp.* 188); 2 *T. & C.* 289; 37 *St. Rep.* 306 (14 *N. Y. Supp.* 90).

Animals—Trespass—Liability of owner. 79 *Hun,* 503 (61 *St. Rep.* 257; 29 *N. Y. Supp.* 947).

horse was possessed of any vicious propensity, or mischievous habit, which required the Defendant to exercise special care over him; which the Court declined to charge. The court did charge, that "it was for the jury to find, under the evidence, whether the Defendant was or was not guilty of negligence in permitting the animal, which did the injury complained of, to run at large, as detailed by the witnesses on the part of the Plaintiff," etc.

The jury found a verdict for the Plaintiff for $500, which was affirmed, on appeal, at the General Term, and the Defendant appeals to this Court.

M. I. Townsend for the Appellant.
W. A. Beach for the Respondent.

DWIGHT, J.—I agree with the counsel for the Defendant, that there is no proof in the case to sustain the allegation in the complaint, that this horse was vicious and accustomed to attack and injure mankind. The fact that a horse is young and playful, that he kicks in the air, and runs and gambols when loose in the street, is no proof of a malicious or vicious disposition. But I regard the allegation as unnecessary, and the absence of proof on the point as not affecting the right to recover.

The finding of the jury under the charge of the Court, was clearly to the effect that the Defendant was guilty of negligence to suffer his horse to go at large upon the sidewalk, as shown in the case. And there was a sufficient allegation to that effect in the complaint. It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence. The vice of the animal is an essential fact only when, but for it, the conduct of the owner would be free from fault. If the most gentle horse be driven so negligently as to do injury to persons or property, the owner or driver will be responsible. Certainly not less so if the horse be negligently turned loose in the street without restraint or control. The motion for a nonsuit was properly denied.

The only question in the case was that propounded by the

Court to the jury, "Was the Defendant guilty of negligence in permitting the horse to go at large in the street?" The Court, I think, might very properly have charged as requested by the Defendant, that there was no proof to justify the jury in finding that the horse was possessed of any vicious propensity or mischievous habit. And yet it is, in one sense, a mischievous habit for a horse to run and play in the public streets. Though it is no proof of a mischievous disposition, it is liable to produce mischievous results. There was therefore no error in the refusal to charge as requested. The instructions of the Court to the jury were correct, and the verdict is conclusive upon all the questions in the case.

The judgment must be affirmed.

GROVER, J.—The disputed questions of fact must be deemed settled by the verdict in favor of the Plaintiff. It must now be assumed that the Plaintiff, a boy of ten years, while upon the sidewalk of Hoosick street, in the city of Troy, was injured by a kick of Defendant's horse, while permitted to run loose in the street. That the Defendant, upon previous occasions, had turned the horse from his stable to go to water unattended; that upon these occasions the horse ran upon the sidewalk and kicked, of which the Defendant had been notified and told that it endangered the safety of those passing along the sidewalk. Upon these facts, the motion for a nonsuit was properly denied.

To permit a horse of this description to run at large upon the streets of a city, manifestly endangers the safety of the people passing in the streets; and the danger is none the less if the running and kicking are mere playful acts of the horse, than if prompted by a vicious disposition. The danger results from the acts of the horse, not his disposition. The Defendant's counsel requested the Court to charge the jury, that there was no proof in the case which can justify the jury in finding that the Defendant's horse, which was alleged to have injured the Plaintiff, was an animal possessed of any vicious propensity or mischievous habit, which required the Defendant to exert any greater care over him than prudent men should

exercise, in general, over horses kept in the same or a similar locality. The Court refused, and the Defendant excepted.

It is impossible to say that this refusal worked no injury to the Defendant. It is true, that the jury may have based their verdict upon another ground; but it does not, with certainty, appear that they did so base it. If, then, the counsel was right in the assumption that there was no evidence of any vicious propensity or mischievous habit in this more than any other horse, he was entitled to the instruction asked for, and its refusal was error. An owner of a domestic animal is not, in general, liable for an injury committed by it, unless it be shown that he had notice of its vicious propensity. (Van Leuven v. Dumond, 1 N. Y. 515, and cases cited.) By vicious propensity, is included a propensity to do any act that might endanger the safety of the persons and property of others in a given situation. Not such only as would impair the utility of the animal for the purpose for which it was kept. This appears from the reason of the rule. The owner is not liabe unless he has notice of the vicious propensity. If he has such notice, he is liable. That is, the owner is not liable for permitting his domestic animal to be at large when he has no reason to apprehend that any injury to others will result therefrom. If he has such reason, he is liable. In the present case the Defendant had notice that his horse, when at large, was in the habit of running and kicking upon the sidewalk. These acts, he must have known, were dangerous to others.

The Court could not judicially determine that all horses, if turned loose in the city of Troy, would act in the same way. This instruction was therefore properly denied. It is not necessary to pass upon the question, whether the owner, by turning his horse loose in the streets of a city, does not thereby render himself responsible for any injury to persons or property done by such horse.

The judgment appealed from must be affirmed.

Judgment affirmed.

JOEL TIFFANY.
State Reporter...

JOHN S. FAKE, RESPONDENT, v. JONATHAN E. WHIPPLE AND ISAAC T. GRANT, APPELLANTS.

Collector's Bond—Disability of Sureties—Delivery of Warrant.

Immediately upon the receipt of his warrant for collecting taxes, the collector becomes a debtor to the county in the sum he is charged with collecting; and he can discharge such indebtedness either by producing the proper vouchers that he has paid over the money, or by his affidavit that certain taxes remain unpaid, and that upon diligent inquiry he has been unable to discover any property belonging to the persons charged with such taxes whereof he could levy the same.

It is no defence to an action brought against the collector for not paying over the moneys charged to him, that the warrant was not delivered to him in season to enable him to make the collections by law. He must show by proper vouchers that he has paid over all that came to his hands as collector, either by voluntary payments, or otherwise.

THIS is an action brought by the supervisor of the town of Lansingburgh, in the county of Renssalear, against Henry S. Tracy, collector of said town, and Jonathan E. Whipple and Isaac T. Grant, the sureties of said collector on his official bond. The action was originally brought by James I. Adams, as supervisor of said town, and the Appellant, as successor of Adams in that office, is substituted as Plaintiff.

The Plaintiff claims to recover the sum of $860 on said bond, as the amount for which the collector is in default, and for which he and his sureties are liable on said bond.

The cause was tried before a Justice of the Supreme Court, without a jury, in February, 1860, at the Rensselaer Circuit. A judgment was rendered, and duly entered, on the 24th of

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Collector of taxes—Void warrant—Liability for failure to collect. 58 *N. Y.* 410; 107 *N. Y.* 487 (12 *St. Rep.* 273; 27 *Week. Dig.* 491).

Collection of taxes—Change in collectors—Liability of sureties. 40 *App. Div.* 154 (57 *N. Y. Supp.* 930); 15 *Abb. N. S.* 352 (5 *Daly,* 311).

Public officers—Responsibility—Degree of care. *D.* 77 *Hun,* 489 (60 *St. Rep.* 556; 28 *N. Y. Supp.* 1095).

March, 1860, against said Henry S. Tracy, by default, for $986.12, damages and costs, and, as to the Defendants Whipple and Grant, the complaint was dismissed with costs.

From this judgment the Plaintiff appealed to the General Term of the Supreme Court.

On the trial, it was admitted that James I. Adams was duly elected supervisor of the town of Lansingburgh, for the years 1857 and 1858, and was duly qualified; and that Henry S. Tracy was also duly elected collector of said town for said years, and was duly qualified; and the following facts were found by the Court:

The due execution of the bond in suit by the collector and his sureties, which was for the faithful execution by said Tracy of the duties of collector, and which was dated on the 23d of January, 1858, and the approval of the bond by the supervisor, and his filing it with the county clerk, were proved, and were found by the Court. The bond was given in evidence without objection.

The corrected assessment roll, with the warrant annexed, duly signed and sealed for the town of Lansingburgh, for the year 1857, was proved, and given in evidence, and the same proved to have been delivered by the clerk of the Board of Supervisors of Rensselaer county, for the year 1857, to James I. Adams, then supervisor for the town of Lansingburgh.

The assessment was completed by the Board of Supervisors on the 20th of January, 1858, on which day the Board adjourned.

On or about the 23d of January, 1858, and in the month of January, 1858, and after the bond executed by Tracy and his sureties had been delivered to Adams, the supervisor, and after Adams had stated to Tracy his approval of the sureties, and that they were satisfactory, the supervisor delivered the corrected assesment roll, and warrant annexed, to the collector.

The warrant directed the payment of the moneys therein specified to be made by the collector on or before the first day of February then next.

On the 19th day of January, 1858, the Board of Supervisors passed a resolution extending the time for the collection of taxes in the towns of the county of Rensselaer, until the first day of March, 1858, provided the collectors should pay in to the county treasurer all moneys by them received, at the expiration of the first thirty days after receiving their warrants.

Tracy, the collector, was informed of this resolution. After receiving the warrant, the collector proceeded to collect the taxes under it, and a considerable amount was collected in the month of February, 1858. They appear to have been voluntary payments.

The warrant required him to collect and pay over to the county treasurer the sums of $4,309.42, and $8,866.93, amounting in all to the sum of $13,176.35. He proved on the trial, by receipts of the county treasurer, only the following sums to have been paid to the latter at the dates as follows:

March 3, 1858	$7,485 80
April 12, 1858	4,531 73
May 14, 1858	130 32
Amounting in all to	$12,147 85

Being less than the amount required by $1,028.40, and it was admitted "that the collector, Tracy, failed to execute the warrant (by returning to the county treasurer all the sums therein directed to be paid to the county treasurer) to the extent of $860."

On the 4th of June, 1858, the treasurer of Rensselaer county issued his warrant to the sheriff of Rensselaer county, for the collection of $860, the amount of the defalcation of the collector.

On the 8th of June, 1858, the sheriff of Rensselaer county returned the warrant unsatisfied for want of goods, etc., whereon to levy, the sheriff having in vain endeavored to collect the money as directed by the warrant.

After the return of the warrant of the county treasurer unsatisfied, the supervisor, having been notified of the fact by the treasurer, commenced this suit. The Judge dismissed the complaint as to the sureties, principally on the ground that the warrant was not delivered to the collector within the time contemplated by law, so as to enable him by compulsory measures to enforce the same against delinquent tax-payers. The Plaintiff duly excepted.

The General Term reversed the judgment of the Special Term, and ordered a new trial. From this order the Defendants appeal to this Court, stipulating that judgment absolute might be given against them, if the said order was affirmed.

C. C. Parmlee and *W. A. Beach* for Appellants.
John H. Reynolds for Respondent.

HUNT, Ch.J.—Immediately upon the receipt of his warrant as collector, the Defendant Tracy became a debtor to the county of Rensselaer in the sum of $13,176.45. The statute makes it the duty of the county treasurer to charge to the collector the sums to be collected by him upon the warrant. (R. S., Part I., Chap. XIII., Title II., Art. 3, Edm. ed., Vol. I., p. 368, § 38; Muzzy *v.* Shattuck, 1 Denio, 233.) This indebtedness could be discharged in one of two modes only: First, by producing to the county treasurer a duplicate receipt of the officer to whom the collector is directed to pay particular sums of money; or, second, upon his affidavit that certain taxes remain unpaid, and that, upon diligent inquiry, he has been unable to discover any property belonging to the persons charged with such taxes, whereof he could levy the same. (R. S. Part I., Ch. XIII., Tit. III., Art. I., Edm. ed., pp. 370, 371, §§ 6, 10.) When it was proved, as it was proved, and as was not denied by any of the Defendants, that Tracy had not accounted for the sum with which he stood charged, in one of these two modes, he was in default, to the amount so failed to be accounted for. When a warrant had been issued to the sheriff to collect that amount of Tracy, and had been returned

unsatisfied, it was also clear, no other facts being established, that the Defendants, as sureties of Whipple, were liable for the amount thus sought to be collected of him. (See Stat. supra.)

The Defendants, the sureties, claim exemption upon the ground that the warrant for collection was not delivered to their principal until January 23, 1858; that the statute required him to give a notice of thirty days before he could enforce collections, and that the same statute required him to return his warrant on the first day of February next ensuing. They insist that the statute involved an impossibility, and that having only six days in which he could receive voluntary payments, and there being no period in which he could enforce his collections, he should not be held liable.

I am strongly impressed with this argument; and, if it had proceeded one step further, and the parties had shown that the collector had not actually received the money, it would have controlled my judgment. Nothing can be more unreasonable than to compel a collector to account for $13,000, and, at the same time, to deprive him of the means of collecting the amount from those required by law to pay it. It would, however, be equally unreasonable to discharge the collector, or his sureties, from a liability for moneys which had been actually received by the collector. He had six days before his warrant was legally returnable, in which he was authorized to receive payments. I know of no reason why he could not also have received payment afterwards, and at all times, while he held the warrant in his hands. It was proved that large sums were paid to the collector; and, indeed, he admitted the payment to him of nearly the whole amount called for by his warrant. He failed, however, to prove, in the manner required by the statute, or in any manner, that he had not actually received the whole sum specified in his warrant. If it was true that he had not received it, this fact could have been so readily proved, that its absence is quite significant. (See Van Rensselaer v. Snyder, 13 N. Y., 299.) The presumption, both of fact and of law, is, that he received the whole amount collectable upon his warrant, and

that he retains in his own hands the balance unaccounted for. In justice, therefore, as well as by the strict terms of the statute, the sureties should be held responsible.

This is the only point upon the appeal requiring our attention. The Defendant Tracy, having accepted the office of collector, acted under it, and the Defendants having signed his bond as sureties in such office, and Tracy having received the moneys as such collector, and paid over a portion of them, it is altogether too late to argue that he never became collector. (Hall v. Luther, 13 Wend. 491; People v. Falconer, 2 Sand. 81; Lee v. Clark, 1 Hill, 56.)

Judgment of the General Term should be affirmed; judgment absolute ordered for the Plaintiff for $860, with interest from June 4, 1858, with costs.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

WILLIAM WHEELER, APPELLANT, *v.* EDWIN A. BILLINGS, RESPONDENT.

Assignment of Patent—Consideration expressed not conclusive.

The consideration expressed in the conveyance of an interest in a patent right by the Plaintiff to the Defendant, is not conclusive upon the parties. Either party is at liberty to show the true consideration.

A general exception to the report of the Referee, "and to each and every part thereof, both as to findings of fact and conclusions of law," is too general to be made available on appeal.

ACTION to recover fifteen hundred dollars, alleged to be due to Plaintiff as the balance of the purchase price agreed to be paid by Defendant for one quarter's interest in Euyre's patent for improvements in stone-dressing machines.

The answer admitted the purchase, but alleged that the price was one thousand dollars, and alleged payment of the latter sum.

The issues were tried before a Referee, who found the sale of the interest in the patent, and the conveyance thereof by the Plaintiff to the Defendant, for the consideration expressed in

Consideration—Parol evidence. 67 *N. Y.* 321; 95 *N. Y.* 578; 98 *N. Y.* 297; 147 *N. Y.* 466 (70 *St. Rep.* 61); 48 *Hun,* 473 (16 *St. Rep.* 471; 1 *N. Y. Supp.* 83); 83 *Hun,* 402 (64 *St. Rep.* 426; 31 *N. Y. Supp.* 756); 8 *App. Div.* 426 (75 *St. Rep.* 227; 40 *N. Y. Supp.* 838); 55 *App. Div.* 448 (66 *N. Y. Supp.* 870); 16 *Misc.* 314 (39 *N. Y. Supp.* 416).

General exception—Sufficiency. 47 *N. Y.* 449; 87 *N. Y.* 557; 120 *N. Y.* 634 (30 *St. Rep.* 653; 2 *Silvr. Ct. App.* 519); 156 *N. Y.* 92; 25 *Hun,* 296; 10 *Misc.* 366 (63 *St. Rep.* 432; 31 *N. Y. Supp.* 17); 5 *Civ. Proc.* 249.

General denial—Proof under. 47 *N. Y.* 437; 101 *N. Y.* 354 (9 *Civ. Proc.* 92); 141 *N. Y.* 345 (57 *St. Rep.* 431; 171 *N. Y.* 181; 2 *Misc.* 387 (51 *St. Rep.* 222; 21 *N. Y. Supp.* 992); 22 *Misc.* 718 (50 *N. Y. Supp.* 37); 14 *Abb. N. S.* 373 (45 *How. Pr.* 482); 5 *Civ. Proc.* 179; 36 *Super. Ct.* 263.

Deeds—Recitals—Presumption. 2 *Hun,* 6 (4 *T. & C.* 274).

the transfer of two thousand five hundred dollars, one thousand of which was paid and secured at the time of the sale, and that, by agreement of the parties, the remaining fifteen hundred dollars was made payable, upon the condition that the Plaintiff should give to the Defendant such improvements as he then had suggested, and might from time to time suggest, in getting up and perfecting a machine under the said Euyre's patent; and that afterward, and without any just cause, the Plaintiff refused to allow the Defendant to use the improvements that he had theretofore made, or to give to the Defendant the aid of such suggestions as he might have done toward perfecting such machine, from which facts the Referee deduced the legal conclusion that the Plaintiff was not entitled to recover, and ordered judgment for the Defendant, with costs.

The Plaintiff filed the following exception to the report of the Referee: "The above Plaintiff excepts to the report of the Referee in the above action, and to each and every part thereof, both as to its findings of fact and conclusions of law." Exceptions were taken to the rulings of the Referee by the Plaintiff, upon the admissibility of evidence which are discussed in the opinion. After affirmance of the judgment entered upon the report by the General Term, the Plaintiff appealed to this Court.

Wm. A. Beach for Appellant.
M. I. Townsend for Respondent.

GROVER, J.—The consideration expressed in the conveyance of the interest in the patent by the Plaintiff to the Defendant was not conclusive upon the parties. Either party was at liberty to show the true consideration of the transfer. (Adams *v.* Hull, 2 Denio, 306, and cases cited.) It follows that the Defendant was at liberty to show that he was not to pay twenty-five hundred dollars for the interest in the patent only, but was to have, in addition thereto for that sum, the right to use the improvements already invented by the Plaintiff, and the right to further suggestions of the Plaintiff in perfecting the ma-

chine. The objection of the Plaintiff to the evidence, upon the ground that it contradicted the writing, was properly overruled.

It must be borne in mind that the Defendant did not execute the writing; that it was a mere conveyance of the interest in the patent by the Plaintiff to the Defendant, reciting the consideration. The evidence was also objected to as inadmissible under the answer. This objection was not well taken. The allegation in the complaint in substance was, that the Defendant promised to pay the Plaintiff twenty-five hundred dollars in consideration of the transfer of his interest in the patent. This was denied by the answer.

Under this denial the Defendant had the right to prove anything that would show the allegation untrue. The proof offered did so show. It proved that, for the twenty-five hundred dollars, the Defendant was to have not only the interest in the patent, but also the improvements of the Plaintiff and his further aid in perfecting the machine; and that the Plaintiff was not entitled to the twenty-five hundred dollars upon conveying his interest in the patent merely, but was to perform other acts in addition thereto, for that sum. The evidence was, therefore, admissible under the denial of the Plaintiff's allegation.

The Defendant having admitted sales of the right to use the patent to an amount sufficient to entitle the Plaintiff to recover the fifteen hundred dollars, provided he was entitled to such recovery, upon the other facts of the case, it was immaterial what he received upon the sale of any particular writing. It was not error, therefore, to exclude such evidence.

The Defendant did not rely upon the fact that the Plaintiff had procured a patent for his improvements to the machine, to show the breach by the Plaintiff of his contract to permit the Defendant to use such improvements. His refusal was proved by other evidence. The consent of the Defendant to the obtaining of such patent was therefore immaterial.

The real question in the case is, whether the Referee was correct in finding that the agreement of the Defendant to pay the Plaintiff the further sum of fifteen hundred dollars was con-

ditional upon the Plaintiff giving to the Defendant for his use, his improvements of the machine, and his further aid in perfecting it. This question has been very ably argued by the counsel for the Appellant. But the excetption to the report is too general, according to the settled rule, to authorize this Court to review this or any other question arising upon the report. (Newell v. Doty, 33 N. Y. 83.)

The judgment appealed from must be affirmed, with costs.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

SOLOMON KELLER ET AL., APPELLANTS, v. HENRY I. PHILLIPS, RESPONDENT.

Husband and wife—Liability for necessaries—Prohibition.

A husband is bound to provide for his wife and children whatever is necessary for their suitable clothing and maintenance, according to his and their situation and condition in life. Ordinarily, he will be presumed to assent to her making upon his credit such purchases as, in the conduct of the domestic concerns, are proper for her management and supervision.

But if he sees fit to destroy such presumption by an express prohibition, no one having notice thereof may trust the wife in reliance upon his credit, unless the husband so neglects his duty that supplies become necessary.

In such case, the party seeking to recover, in the face of such prohibition, takes the burden of proving the neglect of the husband to supply such necessaries. And to that end, it is not enough to show that the goods sold were in their nature suitable and necessary, and that they came to the use of the family, or even that in part they came to the use of the husband himself, unless there be also evidence that the husband knew that they were purchased upon credit. *A fortiori,* it is error to reject evidence tending to show that the husband, after such prohibition, furnished his wife with money and means for her support, and that of the family.

Husband and wife—Necessaries—Liability. 124 *N. Y.* 45 (35 *St. Rep.* 218); 47 *Hun,* 324 (13 *St. Rep.* 439); 8 *Daly,* 546; 20 *N. Y. Supp.* 859.

Necessaries for wife—Separate maintenance. 67 *App. Div.* 223 (73 *N. Y. Supp.* 594); 82 *App. Div.* 158 (81 *N. Y. Supp.* 378); 91 *App. Div.* 552 (86 *N. Y. Supp.* 1102); 2 *Misc.* 50 (49 *St. Rep.* 143).

Distinguished, 176 *N. Y.* 78.

APPEAL from the judgment of the Supreme Court, in General Term, for the Fourth District, reversing a judgment of the County Court and Justice of the Peace, in favor of the Plaintiff, for $111.91.

The action was brought to recover for goods, etc., alleged to have been sold to the Defendant, his family, agents, and servants, at the Defendant's request, on the 20th January, 1860, and afterward, and until 15th October, 1861.

The only defence set up in the answer was, that on the 6th January, 1860, the Defendant forbade the Plaintiffs' trusting his wife on his account and told the Plaintiffs that he would pay no more debts contracted by his wife without his consent; and that afterward, without the Defendant's knowledge or consent, the Plaintiffs sold the goods claimed for to her, and wrongfully trusted her, contrary to the express command of the Defendant.

On the trial, it appeared that for four or five years previous to the transactions in question, the wife and children of the Defendant had been accustomed to procure goods at the Plaintiff's store, and the Defendant had settled all the bills during that time. On the 6th January, 1860, the bill for purchases made chiefly by the wife, from December 16, 1858, to December 19, 1859, being unpaid, the Defendant gave to the Plaintiffs his note or due-bill for the amount, $43.92, which, when it amounted, by accruing interest, to $44.94, appears to have been paid; the time of payment is not definitely fixed by any witness, but if it remained unpaid until $1.02 had accrued as interest, it is obvious that the time of payment was about the 6th May, 1861.

The evidence that the Plaintiffs were forbidden to sell to the wife or family on credit, was the testimony of the Defendant, and of Keller, one of the Plaintiffs, and Snell, their clerk.

The Defendant testified that, on the 6th January, 1860 when he went to the Plaintiffs' store to settle the previous bill, and gave the note therfor, he told the Plaintiff Keller "that he forbid the Plaintiffs of making any charge against him, got by his

wife, family, or any one else;" that he was not able to pay the bills, and that he had not the means to pay with, and that, in strong terms, he declared to Keller he would not pay another cent if he trusted his wife, and that Keller replied, "Just as you say." That the first he knew that his wife and family continued trading at the Plaintiffs' store, was when a bill (which contained charges to January 31, 1861) was laid upon his lap in the store of one Norton; and that he knew nothing of his wife and family getting goods at the Plaintiffs' store, and using them in the family, between January 6, 1860, and the last of October, 1861. He further testified that he furnished his wife and family with money and means to clothe herself and family.

The Plaintiff Keller testified that the Defendant forbid his trusting his wife, at the time *when he paid* the note, and that he *thinks* it was not at the time when he gave the note. That he replied that he "would not refuse his wife any credit she asked for." That the Defendant was angry when he paid the note, and (in the like terms testified to by the Defendant) declared that he would not pay it (*i. e.* anything sold to the wife on credit.) That he told Defendant that he should not refuse his wife credit, for he did not mean what he said; that if he refused, the Defendant "would be mad." (This latter statement the Defendant in his testimony contradicted.) Snell, the clerk, testified that "after paying the note, as the Defendant was about to leave the store, he told Mr. Keller not to trust his wife any more."

Other particulars in the testmony of these witnesses, left it at least doubtful whether it was at the making of the note or when the note was paid, that the prohibition was given.

The Plaintiffs continued to furnish goods, which were proved to have been used in the Defendant's family, toward clothing the wife, children, and servants of the Defendant, for bedding, and some articles for shirt-bosoms for the Defendant. What was used for the servant was deducted from her wages. In aid of the Defendant's claim, that he himself furnished his wife with suitable means for the support of herself and the family, the Defendant proved that he had a boarder in his family, at

$2 a week, for nearly three years; and the question was then asked whether his wife received the money paid for such board, and on objection the question was excluded. So also an inquiry whether the wife had the milk of two cows to sell, and apply the proceeds as she thought proper, was excluded.

The jury found a verdict for the Plaintiffs, and the judgment entered thereon was affirmed by the County Court.

On appeal, the Supreme Court reversed both judgments, and the Plaintiffs appealed to this Court.

J. E. Dewey for Appellant.
S. Hand for Respondent.

WOODRUFF, J.—The Defendant was liable for such part of the goods, mentioned in the Plaintiffs' bill of particulars, as were purchased before the Defendant gave notice, forbidding them to sell to his wife and family on credit. In addition to such assent as would be presumed from the nature of the purchases and their actual use in his family, there was the authority resulting from some four or five years' dealing by the Plaintiffs with the wife, and the payment of the bills by him, in distinct sanction of the sales.

This was ample to warrant a continuance of the like dealings, and bound the Defendant to pay for the further purchases, independent of the question how far, in the absence of such prior authority or sanction, the husband is bound by the contracts of the wife, in the purchase of goods for domestic use. There was conflict in the testimony as to the time when the notice was given; the Defendant fixing a date prior to the sale of any of the goods in question in this action, and the Plaintiff Keller, and the clerk Snell, fixing a date prior to which two-thirds of the goods had been sold and delivered.

Had the Plaintiffs, under such conflicting evidence, recovered for the goods sold prior to the payment of the Defendant's note, on which occasion the Plaintiff says the prohibition was given, it would show that in respect to the time when the notice was given, which was set up in the Defendant's answer as his sole defence, the recollection of the Plaintiff and the clerk was

deemed by the jury more reliable than the recollection of the Defendant, and there could be no reason for disturbing the judgment. But the recovery was also had for the goods sold after (according to the testimony of the Plaintiff and the clerk, as well as that of the Defendant) the notice was actually given. And that the conversation did take place in which the Defendant forbade the Plaintiffs to sell goods to his wife upon credit, and declared in terms quite emphatic, though profane and indecent, that he would not pay for goods so sold, is not in doubt; it is sworn to by both parties, as well as, in substance, by one other witness.

The rules of the law relating to the power of the wife to bind her husband to payment for goods purchased by her for the use of herself and the family, are well settled. The husband is bound to provide for her and them whatever is necessary for their suitable clothing and maintenance, according to his and their situation and condition in life. And ordinarily he will be presumed to assent to her making such purchases as, in the conduct of the domestic concerns, are proper for her management and supervision.

But he is at liberty to withold such assent, and destroy such presumption, by an express prohibition. And if he do so, no one, having notice thereof, may trust the wife in reliance upon credit, unless the husband so neglects his own duty that supplies become absolutely necessary, according to their condition.

In the present case, therefore, the sale of the goods being proved, or not being denied by the Defendant, the burden of proof was upon the Defendant to show that the credit was given against his express dissent, and notice thereof to the Plaintiffs. This being proved, the burden was upon the Plaintiffs to show that the Defendant did not suitably provide for his family according to his and their condition. Of that the Plaintiffs were not to be the judges, except at the risk of establishing it by proof, and of that they offered no testimony whatever, but on the trial objected to the Defendant's proving affirmatively that he did so, and the Justice excluded evidence

offered by him tending to *show* in what mode, and, in fact, to what extent, that provision was made.

The Defendant was not bound to show affirmatively that he did so provide; and yet, so far as he appears to have been permitted, his testimony went to show that he did make suitable provision.

Nor is it enough that the articles sold are in their nature and description necessary and suitable for the use of the wife and family. If they were not so, there would be no presumption of the husband's assent to the purchase in any case. It is indispensable, where the vendor has been forbidden to sell upon the wife's request, on the husband's credit, that the vendor show, not only that the goods were in their nature suitable and necessary, but that the husband neglected his duty to provide supplies, and that, for that reason, they were necessary. These rules are elementary.

Modern legislation, in preserving to the wife all her own property, has taken away some of the grounds upon which the duty of the husband was placed by the common law; but it has not yet gone so far as to invest the wife with a discretion which the husband cannot control, and enable her to spend his property or involve him in debt against his will. (Mott *v.* Comstock, 8 Wend. 544; Kimball *v.* Keyes, 11 Wend. 34; 2 Swift Dig. 31; 2 Kent's Com. 146; Blowers *v.* Sturtevant, 4 Denio, 46). It is suggested by counsel for the Appellants that the jury may have inferred from the conversations testified to, that the Defendant was not in earnest when he forbid the Plaintiffs trusting his wife on his credit; that the Defendant knew that they did not think he was in earnest. There was nothing in the conversation to warrant any such inference, and there was no room for speculation.

On the contrary, no terms could be more explicit or more apparently sincere. True, the Plaintiff Keller declared to him that he would not refuse his wife any credit she asked for, but the Defendant also declared that he would not pay a cent of it. This declaration of the Plaintiff Keller was either a rude and unwarrantable defiance of the husband, or an expression of

an intention to sell upon the wife's credit; if the latter, he was at liberty so to sell, but such sales would not bind the husband.

It is also insisted, that from the fact that a bill for a part of the goods was stated by the Defendant to have been laid upon his lap in the store of one Norton, it might be inferred that he either never intended the notice or proclamation to be acted upon, or that he assented afterward to the sales made, and so practically revoked it.

Had the Plaintiffs shown the circumstances under which this bill was laid upon the Defendant's lap, or by whom it was placed there, or that the Defendant was called upon to pay it, and either assented or did not assent, or anything, in short, from which it could reasonably be inferred that the Defendant accepted it as an account against him, there would be force in the argument; but the bald fact "that the bill was laid on his lap in Norton's store," without showing by whom or how it came to be in Norton's store, or whether any one representing the Plaintiff was present to receive any assent or dissent, or what was said, or what was done with the bill thereafter, or even that the Defendant retained it in his possession, warrants no interference at variance with his previous declared purpose.

For these reasons the judgment of the General Term of the Supreme Court should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

HARRIET OSTRANDER, RESPONDENT, v. ABIRAM FELLOWS, APPELLANT.

Findings of fact—Jurisdiction.

MASON, J.—This suit was brought to set aside a bond and mortgage, made by the Plaintiff jointly with her husband, to the Defendant, mainly to secure the private debt of the husband, and the mortgage was upon lands belonging to the Plaintiff alone. The Plaintiff claimed in her complaint, and sought to establish by her proof, that this bond and mortgage was

obtained by fraud, coercion, and undue influence. The Referee found, upon the issues of fact, in favor of the Plaintiff, and gave judgment for the Plaintiff, which was affirmed by the Supreme Court in General Term.

The issues involved in the case were questions of fact, and as the findings of the Referee are not without evidence to support them, they are conclusive upon this Court, and are not subject to review here. (12 N. Y. 258; 19 id. 207; 14 id. 310; 4 id. 284; 13 id. 587; 18 id. 573.) But the Appellant having submitted no points, the judgment should be affirmed without considering the case.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

AUSTIN SHERMAN, APPELLANT, *v.* MICHAEL McKEON, RESPONDENT.

Street or Highway—Bounding of lot adjoining—Centre of street.

Where the boundaries are on streets in the city, in the absence of evidence to the contrary in the grant, the lot will be presumed to be bounded by the centre of the street.

The intention of the grantor to otherwise bound the premises, it not manifested by a statement of the dimensions of the lot; and such statement must be subordinated to the description "bounded on the street, &c."

THIS was an action of ejectment, commenced in 1855, in the Superior Court of the city of New York, and tried in June,

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Waiver of Statutory provision. 92 *N. Y.* 326; 98 *N. Y.* 453; 151 *N. Y.* 265; *D.* 170 *N. Y.* 297; 55 *Hun,* 136 (28 *St. Rep.* 456; 8 *N. Y. Supp.* 610); 63 *Hun,* 598 (45 *St. Rep.* 52; 18 *N. Y. Supp.* 405); 52 *App. Div.* 269 (65 *N. Y. Supp.* 473; 31 *Civ. Proc.* 78); 4 *Misc.* 119 (53 *St. Rep.* 464; 23 *N. Y. Supp.* 897); 16 *Misc.* 585 (74 *St. Rep.* 483; 38 *N. Y. Supp.* 806); 23 *Misc.* 450 (51 *N. Y. Supp.* 284); 3 *T. & C.* 341; 11 *St. Rep.* 263.

Conveyance—General and particular description. 15 *App. Div.* 270 (44 *N. Y. Supp.* 215).

Street as boundary. 27 *Hun,* 5; 66 *How. Pr.* 84 (51 *Super. Ct.* 15); 39 *St. Rep.* 935 (15 *N. Y. Supp.* 374).

1858, before Mr. Justice Pierrepont and a jury. It was brought against the Defendant, as a lessee of George Harrison, to recover possession of a quadrangular lot of land on the south-east corner of Bleecker and Grove streets, in this city, being about seventeen feet one inch in front, running back seventy-four feet ten and a half inches on both sides, and being about thirteen feet seven and three-fourths inches on the rear.

The premises were originally in 1810, and prior to 1837, a public highway and a part of Grove Street, which was north of the original city of New York, and south of the lands laid out on the commissioners' map, being part of what is called Greenwich village.

The Plaintiff, as evidence of title, proved a conveyance from the Manhattan Company to Charles Oakley, of four lots on the corner of Burroughs (afterward Grove) Street, and Herring (afterward Bleecker) Street, being seventy-five feet on Grove Street and ninety feet on Bleecker Street, dated August 17, 1827, and recorded August 25, 1827, under which deed Charles Oakley went into possession in 1827.

Plaintiff also proved certain judgments against Charles Oakley, and a deed from Thomas Carnley, sheriff, to the Plaintiff, dated January—, 1853, recorded January 10, 1853, reciting the executions on said judgments, and conveying to the Plaintiff all the right, title, and interest which Charles Oakley had on the 18th day of June, 1839, or at any time afterward, in and to the premises in question in this suit.

Plaintiff also proved a quitclaim deed from Charles Oakley to him, of the premises in question.

Plaintiff also proved that Charles Oakley, in 1838, inclosed the lot or gore in question by a board fence, and remained in the quiet and undisturbed possession thereof, until Harrison, the lessee of the Defendant, took possession in 1848 or 1849.

Plaintiff also proved that in January, 1836, proceedings were taken by the Mayor, Aldermen, and Commonalty of the city of New York, "to open a public place between Grove, Christopher, and Fourth streets, and to improving Grove Street between Fourth and Bleecker streets, by widening the same on the

northerly side, and by closing a part thereof on the southerly side;" that an application for that purpose was made to the Supreme Court; that commissioners were appointed, who, on or about February 17, 1837, made their report, by which, among other things, they reported that a gore of land lying in Grove Street, on the southerly side (including the premises in question), was "required for the purpose of being closed, and vesting the same to the use of the Mayor, Aldermen, and Commonalty of the city of New York;" that unknown owners are seized of such strip of land "*in fee,* subject to an easement or right of way over the same, in the parties and owners interested in the premises bounded by and fronting on the same;" and that they had assessed the benefit and advantage to the said Mayor, etc., by and in consequence of said piece of land being converted to their use, to the amount of $5,125.

In their first report the commissioners made some small awards and assessments on Oakley's property, and advertised for objections, etc.

On hearing the objections, they reconsidered their action, and assessed on the pieces of land thereinafter designated, and by which designation the same had been described in said report, the sums opposite therto, instead of the sums mentioned in such report. Such additional report also stated, that the commissioners had allowed to the respective parties therein mentioned, the "amount set opposite their names, in lieu, and instead of the assessments set forth in such original report, that is to say, 'No. 51, Charles Oakley ($1,500), fifteen hundred dollars.' "

It appeared by the reports, that the sum assessed upon the corporation of New York, for benefit, by the conversion to their use of the part of Grove Street closed, including the land in controversy, was necessary, in addition to the other assessments made for benefit to other pieces of land, to make up the amount required to pay the estimate for damages to the owner of lands therein awarded, including the $1,500 so awarded to Oakley, and the expenses of the proceedings. It also appeared, that Oakley drew an order on the Comptroller for the sum awarded to him for the opening of Grove Street, which was

The report was confirmed on April 5, 1837.

The Defendant read in evidence a deed from Oakley and wife to David H. Robertson, recorded March 18, 1838, conveying the same premises conveyed by the Manhattan Company to Oakley, and, by the same description as in that deed, with this difference, that, in one part, the words are, "northerly by the *late* line of Grove Street," instead of "northerly by Grove Street."

Also, a mortgage by Oakley to the executors of William W. Gilbert, for $15,00, recorded February 22, 1835, of the same premises, and by the same description as contained in deed from the Manhattan Company to Oakley; also, the proceedings in Chancery, by which this mortgage was foreclosed.

Also, a deed from Philo T. Ruggles, Master in Chancery, to James Dill, recorded February 8, 1847, of the lot bounded by the old line of Grove Street, and adjoining the lot in question; the lot in question was not included in Ruggles' sale.

Also, a deed from James Dill to George Harrison, of the same lot recorded May 2, 1848.

The Defendant also put in evidence the map made for the commissioners to widen and improve Grove Street. On this map, the lot adjoining the premises is marked No. 51.

The Defendant also introduced in evidence a deed from the Mayor, Alderman, and Commonalty of the city of New York, to George Harrison, of the lot in question, recorded October 20, 1847, the consideration of which was $3,100.

It was admitted that the Defendant took possession by virtue of this deed, as a lessee of said Harrison, and erected a building thereon.

Some other facts were proved, which are referred to in the opinion.

The Judge directed a verdict for the Defendant. Judgment was entered upon said verdict, and the Plaintiff appealed to the General Term of the Superior Court, where the judgment was affirmed, and the Plaintiff appealed to this Court.

Charles W. Sandford for Appellant.
Malcolm Campbell for Respondent.

MILLER, J.—The claim of the Plaintiff, that Charles Oakley, from whom his title is derived, acquired title by virtue of the deed executed by the Manhattan Company to him, appears to be well founded. The west and north boundaries of the lots are on two streets, and, according to well-settled principles, this includes, at least for certain purposes, to the middle of the street, unless there is evidence on the part of the grantor to exclude the street from the grant. (Hammond *v.* McLauchlan, 1 Sandf. 323; Jones *v.* Cowman, 2 id. 234; Adams *v.* Saratoga & Wash. R. R. Co., 11 Barb. 414.) Such intention is not manifest by the statement of the dimensions of the lot, and this statement must be regarded as subordinate to, and controlled by, the previous reference to the street, and the use of that term.

Assuming this to be the true construction of the conveyance to Oakley, then Oakley acquired title by deed to the land in Grove Street, in front of the premises taken possession of by him, to the centre of the street. His title and interest was sold by virtue of executions in certain judgments existing against him, and a sheriff's deed executed to the Plaintiff, conveying all the interest which he had on the ninth day of June, 1839. This deed was dated in January, 1853. Passing by the quit-claim deed made by Oakley to the Plaintiff in 1850, which is unimportant, the sheriff's deed conveyed a title to the premises to the Plaintiff, if Oakley's title had not been divested by some act of his, or by some lawful proceeding of the corporation of the city and county of New York, as is claimed by virtue of an ordinance directing Grove Street to be widened and opened, and which was passed in January, 1836.

The Defendant claims that Oakley's title was thus divested, and relies upon various acts, by virtue of which a title was acquired superior to the Plaintiff's title, and insists: first, that it was done by the foreclosure of the mortgage made by Oakley and wife, in 1835, and a deed of conveyance of the master, who made the sale to one Dill, in 1846, and by a subsequent conveyance of Dill in 1848 to George Harrison, who was the landlord of the Defendant, who occupied a portion of the premises cov-

ered by the deed to Oakley, and the mortgage in question; second, by the conveyance of the title made by Oakley and wife to David H. Robertson, on the 18th day of March, 1839; and thirdly, by the proceedings had under the ordinance of the corporation of New York, passed in 1836, and the conveyance by the corporation of New York to George Harrison in 1847.

I. As to the title derived by the deed of the Master in Chancery to Dill and his grantee, it may be remarked, that this deed only conveyed two of the lots owned by Oakley, the boundaries of which commenced at a point on the easterly side of Bleecker Street, seventeen feet and one inch from the south-easterly corner of Bleecker Street, thus excluding expressly, as I understand from the description, the premises in question. It is quite plain that these premises cannot be conveyed as a mere appendage of those embraced in the deed.

II. It is also equally clear that the deed to Robertson did not include the lot in question, as the description bounds the premises by the "late line of Grove Street," evidently meaning the old line as it existed before the new one was established by the proceedings had by the corporation, which, at that time, had been but quite recently confirmed. Although the conveyance states that this was the same premises conveyed by the Manhattan Company to Oakley, yet I think that the specific description must control, and they must be regarded as conveyed within these boundaries, without any modification or change, by the reference to the deed to Oakley. It is said that the expression employed will be presumed to refer to the late centre line, in connection with the words after the description "along and on Grove Street." I think that will not bear this interpretation. The description evidently makes a distinction between the old line and the new one, and, in stating a line for a boundary, it cannot well be said that the statement of itself makes the centre the line.

III. As to the title acquired by the proceedings of the corporation, and the conveyance to Harrison, which is the principal question to be determined in this case, it will be observed that these proceedings were commenced and consummated prior to

any transfer of title by Oakley, and before any lien had been acquired by judgment upon the premises, against Oakley the owner. They date prior, in point of time, to any other supposed or real title; were in advance of the sheriff's deed, and Oakley's quitclaim to the Plaintiff under which he establishes title; and, if they can be sustained and upheld as effectual, to vest the title in the corporation to the gore declared to be regarded as closed, furnish a complete and perfect title, under the deed of the corporation, to the Defendant's lessor.

The first report of the commissioners appointed to make the estimate and assessment in the Grove Street improvement, declares that a certain lot of land which includes the premises in question was required for the purpose of being closed, and of vesting the title to the same in the corporation of the city of New York; and certain lots adjoining the aforesaid lot are described and designated as assessed and benefited by the improvement. In the margin, and opposite to a description of these several lots, is the name of "Charles Oakley," and a sum of money and certain numbers are placed under such description. The object and meaning of the name, amounts, and numbers, is not stated. It is also stated in the report, that unknown owners are seized in fee to the premises so required to be taken, subject to the easement of a right of way over the same in the parties and owners interested in the lands and premises bounded by, and fronting on, the same. The additional, or second report, corrects the first by altering the sums assessed on certain of the lots, and by allowing to Oakley the sum of one thousand five hundred dollars, in lieu and instead of assessments set forth in the first report.

It cannot be denied that there is some obscurity in the language employed. It must be interpreted, however, in view of the facts elicited, and the circumstances surrounding the case. It is evident, I think, that the amount allowed to Oakley was for his right, title, and interest in or to the land in question, which, from 1810 until the proceedings to improve Grove Street were instituted, lay in the public street, and to which he claimed title, by reason of his being the owner of the land which

was opposite to it, and which was bounded upon Grove Street. It is not reasonable to suppose that this large award could have been made for damages, which consisted in giving Oakley the same front on Grove Street as he had before enjoyed, and all the benefits of the improvement, as well as leaving him to enjoy the title to this additional lot. In fact, the commissioner's report, in entire contradiction of any such theory, purports to vest the title of the lands in the corporation. They could not have awarded any such amount, simply because the public would be prevented from using the land closed, and taken as a street.

The declaration, that the sum allowed was to be instead of assessments set forth in the first report, has no great significance in connection with the facts proved. If it can in any way be considered as having any bearing, it is entirely adverse to the idea of making any such allowance. So, also, the number at the end of the description appears to be without any ap- as a lot assessed, which would be entirely inconsistent with parent object. It is previously stated in the last report twice, making an allowance. The amount allowed was paid by the order to Oakley, as an award to him, and must have been for his interest in the land taken and vested in the corporation, and for nothing else. The report declares, that the commissioners have estimated and assessed the benefit and advantage to the Mayor, Aldermen, and Commanalty of the city of New York, in consequence of the land required being converted to their use. It allows the sum of fifteen hundred dollars to Oakley; and the fair and rational inference is, that the sum allowed was for the extinguishment of Oakley's interest in the premises in question, and for vesting the same in the corporation. Upon no other hypothesis can such an allowance be satisfactorily explained, and it could not have been for any other purpose.

It is insisted by the counsel for the Appellant, that the laws under which this improvement was made, so far as they authorize the taking of private property for private purposes, are unconstitutional and void. This is undoubtedly true, when the

power is exercised in opposition to the consent of the owner; but, when that consent is given, it is a waiver of the objection, and removes the difficulty. A party may renounce a constitutional provision made for his benefit, and, when the law which provides for a transfer of property does not require the consent to be in writing, it may be manifested by parol acts and declarations, so as to effect a transfer of the title to real estate, notwithstanding the Statute of Frauds. (Baker *v.* Braman, 6 Hill, 47; Embury *v.* Conner, 3 N. Y. 511.) The receipt of the money operates as an estoppel, and the damages paid have the same effect as a conveyance, and vest the title in the corporationation. The consent of the Plaintiff is apparent from his conduct in the matter.

He evidently appeared and interposed objections to the first report made by the commissioners, and probably induced them to make the award of one thousand five hundred dollars. He had a right to object to the confirmation of the report, upon the ground that the land was taken without his consent, and, had he done so, the report would have been set aside. (Matter of John and Cherry Sts., 19 Wend. 659.) This he failed to do, and consented to receive the money without objection. The corporation was not bound to pay the money, except upon a waiver of all objections as to the title conferred, and his receipt of the money was a waiver of the objection, and a sufficient consideration for his affirmance of the title in the corporation. He received the money after he had inclosed the land; never offered to return it; remained quiet without asserting his claim, long after the possession was surrendered to the grantee of the corporation, who paid a valuable consideration for the conveyance; allowed him to improve it without making any claim, and left it for the Plaintiff, a purchaser upon an execution sale under an old adjudgment, sixteen years after the land was appropriated under the corporation ordinance, to bring an action for its recovery. The fact that Oakley took possession, and had it for some time, so far as it shows a claim of title, is sufficiently answered by the subsequent sur-

render to a party claiming title under the corporation deed, as well as by the other facts of the case.

Under the circumstances existing, it appears to me to be quite plain that the Plaintiff is precluded from asserting a title, and cannot maintain this action.

The judgment must be affirmed.

Judgment affirmed.

JOEL TIFFANY.
State Reporter.

CATHERINE N. FOREST, RESPONDENT, *v.* CHARLES G. HAVENS, ET AL., APPELLANTS.

Undertaking on appeal—Notice—Contemperaneous Acts.

The reciting in an undertaking on an appeal that the party "intends to appeal" &c., is not inconsistent with the fact that the appeal and the giving the undertaking are *synchronous*. There is no impropriety in such a recital in an undertaking on an appeal.

Jas. T. Brady for Appellant.

Chas. O'Conor for Respondent.

BACON, J.—Upon the trial of this cause, the only available exception taken by the Defendant's counsel was to the refusal of the Judge to charge as requested, that the Plaintiff could only recover nominal damages, for the reason that it appeared that the suit in which the undertaking of these Defendants was given was a suit for a divorce prosecuted in the Superior Court, which had no jurisdiction to grant a divorce, and the Court of Appeals had no jurisdiction of the action in which the divorce was granted, and the undertaking was therefore void.

Upon the argument here, this exception is abandoned, as it well might be, after the decision of this Court in Forrest *v.* Forrest (25 N. Y. 501), explicitly affirming the jurisdiction of

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Deed and undertaking—Recitals—Presumption. 54 *N. Y.* 213.

Undertaking on appeal—Conformity to statute. 2 *Hun,* 571.

the Superior Court of the city of New York, in actions of divorce, upon the ground of alleged adultry. That Court having jurisdiction, and having rendered a judgment in the cause, there was of course no question as to the power of this Court to entertain the appeal.

In submitting this case to the final judgment of this Court, the counsel for the Appellant relies upon a single point to reverse the judgment. He insists that the undertaking upon which this action was brought is void on its face. The undertaking, which bears date on the 2d day of June, 1860, and was filed on the 4th of that month, recites that the Appellant, feeling aggrieved, &c., *intends to appeal,* and then follows the obligatory part of the instrument. The Code (§ 327) provides that an appeal must be made by the service of a notice in writing on the clerk and the adverse party, stating the appeal from the judgment, or some specified part thereof. By section 334 it is provided that, to render an appeal effectual for any purpose, a written undertaking, with sureties, must be exexcuted to pay all costs and damages. The argument of the counsel is this: "The appeal is not made until the notice is served, and it is not effectual until the undertaking is given. Consequently, to render the undertaking valid, it should be executed contemporaneously with, and form a part of, the appeal; whereas the undertaking, as it recites, was executed before the appeal." To this objection thus taken and presented, there are several very sufficient answers.

In the first place, the objection assumes that the notice and the giving of the undertaking were not contemporaneous acts. The complaint avers that Forrest appealed on the 2d day June, as by his notice in that behalf will appear, and upon that occasion the Defendant in this suit executed the undertaking in question; and on the trial it is stated that the Plaintiff gave in evidence the record of the judgment in the Supreme Court, as set forth in the complaint which included the notice of appeal, and of course identifies its date, which synchronized with the giving of the undertaking.

Again, no such objection was taken upon the trial, and

should not be listened to here. The counsel claims that, being an objection which could not be obviated by proof, nor the defect cured, it may be availed of on appeal, although not before. But this is assuming what cannot be conceded; for if the point had been taken, the Plaintiff's counsel might have proved as matter of fact, as indeed I think he did by necessary implications, that the two acts were not separated by any interval of time, but were in truth contemporaneous.

But there is no impropriety in the recital in the undertaking, that the party giving it intends to appeal. He forms the purpose to appeal, and the giving of an undertaking being an essential constituent to the completion of his purpose, it is not only truthful, but appropriate, to recite the fact in the instrument which is to effect that purpose. And it cannot be assumed that the undertaking is executed with reference to any other notice than the one actually given in the case which the undertaking recites. The two things are essential parts of one transaction, and are not only to be construed, but to be taken together as necessary complements to a thing perfected by their joint agency.

Finally, the undertaking in this case, although prescribed by statute, is not one given to a public officer, where the rule of strict conformity is held with considerable stringency. It is a voluntary bond, not given under any legal compulsion, but to procure a private benefit; to wit, an extension of time to pay a demand which the law had adjudged to be most meritorious and just. It has fully accomplished that object, which was, doubtless, all it was intended to subserve; and it would be a perversion of the ends of justice to allow an objection so baseless, and, in my view, so frivolous, to defeat a recovery so long resisted and so patiently waited for.

The judgment should be affirmed, with costs, and ten per cent. damages for the delay.

All concurring.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

GEORGE W. CARD, APPELLANT, v. JOHN H. CARD AND OTHERS, RESPONDENTS.

Specific performance—Evidence—Party to action—Husband of defendant.

In an action against the heirs-at-law and administrators of a deceased, to compel the specific performance of an alleged agreement by the deceased to convey land to the Plaintiff, the Plaintiff is entitled to be sworn as a witness on his own behalf, although he is not competent to testify to transactions had with the deceased personally.

The refusal to permit him to be sworn cannot be held an immaterial error, not calling for the reversal of the judgment, upon a conjecture or presumption that he could not have testified to any facts material to his case, because it is found affirmatively that the contract relied upon is not proved.

***Non constat* that he could not have given testimony to facts other than transactions had with the deceased personally, which as against the heirs-at-law would have tended to prove the existence and binding force of the contract alleged.**

THIS was an action for specific performance of a parol contract to convey land, alleged to have been made by one Job Card, deceased, in his life time, with the Plaintiff. The Defendants are the heirs-at-law, personal representatives, and judgment creditors of the deceased. The cause was tried before the Hon. D. Pratt, as Referee. On the trial, on the 25th day of April, 1860, the Plaintiff was offered as a witness generally in his own behalf, and was excluded. Several of the Defendants were sworn, and testified as witnesses for the defence, under the objection of the Plaintiff that they were incompetent under section 397 of the Code, being jointly interested with their Codefendants; and, as to certain of them, that

Witness—Competency—Transaction with decedent. 45 *App. Div.* 310 (61 *N. Y. Supp.* 146); 48 *App. Div.* 368 (63 *N. Y. Supp.* 277); 71 *App. Div.* 506 (75 *N. Y. Supp.* 892); 97 *App. Div.* 432 (89 *N. Y. Supp.* 965); 8 *Misc.* 83 (58 *St. Rep.* 830; 28 *N. Y. Supp.* 597); 64 *Barb.* 191; 56 *How. Pr.* 49.

Witnesses—Competency—Husband for wife. 51 *N. Y.* 47; 2 *T. & C.* 322.

they were husbands or wives of Codefendants, in whose behalf they were examined.

The sole finding of fact by the Referee in his report was as follows: "I find that the parol contract alleged in the Plaintiff's complaint has not been sufficiently proved to entitle him to a specific performance of the same." Upon which he certified that the complaint should be dismissed. Judgment was entered accordingly, which was affirmed at the General Term, and the Plaintiff appeals to this Court.

A. J. Parker for Appellant.
F. Hiscock for Respondents.

DWIGHT, J.—There are only two questions in this case, and both are questions of evidence under the Code, viz.: First, did the Referee err in excluding the testimony of the Plaintiff; and second, did he err in admitting the testimony of the Defendants? The latter question presents no difficulty. The amendment of section 399 of the Code, adopted in 1860, was in force at the date of this trial, and it provided that "a party to an action . . . . may be examined as a witness in his own behalf, or on behalf of any other party, in the same manner . . . . as any other witness, except that a party shall not be examined against parties who are representatives of a deceased person, in respect to any transaction had personally between the deceased person and the witness; and except, also, that neither husband nor wife shall be required to disclose any communication made by the one to the other."

The Defendants were therefore entirely competent as witnesses in their own behalf, or in behalf of each other. The only restriction upon their examination was, that neither of them, who was a husband or a wife, could be required to disclose any communication made by one to the other. Section 397 of the Code was substantially abrogated in 1857, when, by an amendment of section 397, parties were admitted to be witnesses in their own behalf, subject tc oertain limitations of notice; and it was wholly abrogated, when, in 1860, these limita-

tions of notice were removed. The object of section 397 was to enlarge the rule of the common law, so far as to permit parties to testify in behalf of their coparties, when that could be done without permitting them to testify in their own behalf. Hence, it provided that a party might be examined on behalf of his coparty "as to any matter in which he was not jointly interested, and as to which a separate, and not joint verdict or judgment, might be rendered."

And therefore when, in 1857 and 1860, the Legislature abolished the rule of the common law, forbidding parties to testify in their own behalf, it abolished the restriction of section 397, and that enactment might then as well have been stricken from the statute book. It has had no force or application, in any possible case, since 1860. Equally ineffectual was the objection, that certain of these Defendants stood in the relation of husband or wife to Codefendants; they were, nevertheless, under section 399, entirely competent to testify in their own or their Codefendants' behalf, subject only to the restriction as to the disclosure of communications with husband or wife. There was, therefore, no error in the ruling of the Referee admitting the testimony of the Defendants.

It is equally clear, from an examination of the same statute, that the Plaintiff was competent as a witness in his own behalf, as to any matter other than transactions had personally between himself and the deceased. The question is, whether the exclusion of this witness was an error for which the judgment should be reversed. It is clear that the Plaintiff was not competent to speak as to any transactions had personally between himself and the deceased. The action was against the heirs-at-law, the personal representatives, and the judgment creditors of the deceased, all of whom were proper and necessary parties thereto: the heirs-at-law, as succeeding to the title of the deceased by descent; the personal representatives, because they might need the avails of the real estate in question to pay debts; and the judgment creditors, because of their liens upon the property.

The fact that the personal representatives were made parties, and appeared in the action, brings the case within the express terms of the statute, which made the party incompetent to testify to personal transactions, etc., as "against parties who are representatives of a deceased person;" but I think that the statute equally disqualified the party to testify to such matters against the heirs-at-law, when the action related to the real estate of the deceased. In this, and in all similar cases, the heirs-at-law are made parties, *because* the action related to the realty. The heir-at-law succeeds to all the rights and responsibilities of the deceased in respect to the realty, and in all respects, pro hac vice, his representative. The executor or administrator, except in special cases, represents the deceased only as to the personal estate, and hence is denominated the "personal representative;" while the heir-at-law, though not technically so denominated, is equally the representative as to the real cause.

The reason, or the rule under consideration, certainly applies with equal force to the case of the heir-at-law as to that of the personal representative. In either case the intention is, that the surviving party to the transaction in issue shall not have the unfair advantage of giving his version of the matter, when the other and adverse party to the transaction is prevented by death from being heard to contradict or explain it. The fact that the Legislature, in 1862, substituted the words, "executors, administrators, heirs-at-law, next of kin, or assignees," for the term, "representative," in the statute, seems to me not to contravene, but to support, the construction here given to the previous statute. The object of the substituion may well have been, to express more specifically the intention of the original statute, and to have no ground for the misconsideration which in one or two instances had been put upon it.

If the foregoing views are correct, the Plaintiff, if sworn as a witness, could not have been permitted to testify to any matter of personal transaction between himself and the deceased. Was there any other matter to which, as appears by the record,

his testimony would have been pertinent and material? I do not think it possible to say that there was no such matter. It is true, that the only question considered by the Referee was, whether the parol contract declared upon was ever made. This he found not proved, and his decision was based upon this sole finding. It is true, also, that the Plaintiff could not have been permitted to give evidence of the actual making of the contract between the deceased and himself; but it is possible, nevertheless, that he might have given evidence of facts which would have borne upon that question, and that have been material to the issue. It is impossible to say that he might not have testified to direct and positive admissions by the heirs-at-law, of the existence of such a contract. It is easy, also, to conceive of many circumstances possibly within his knowledge, which would have tended to establish the fact that such a contract had been made. But it is sufficient to say that the Plaintiff was competent as a witness, and that material facts may have been within his knowledge, to which he was competent to testify. Such being the case, his conclusion as a witness was a fatal error, for which a new trial should have been granted.

WOODRUFF, J.—Appeal from judgment for Defendants, on trial before a Referee, affirmed in General Term of the Supreme Court, in the Fifth District.

The Plaintiff filed his complaint against the Defendants as heirs-at-law of Job Card, deceased, to compel the specific performance of a contract alleged to have been made by Job Card, their deceased ancestor, for the conveyance to the Plaintiff of certain lands, the performance of which contract by the Plaintiff was averred by him. The husbands and wives of the several heirs-at-law, and the personal representatives of the deceased, were also Defendants.

On the trial, the Plaintiff was called as a witness on his own behalf. On objection by the Defendants, the Court rejected him as incompetent, and refused to permit him to be sworn.

The husbands and wives of the heirs-at-law were also called as witnesses by the Defendants, and, although objection was

made by the Plaintiff that a husband could not testify in favor of his wife, and a wife could not testify in favor of her husband, they were permitted to testify.

Judgment was rendered for the Defendants, and it was found that no contract for the conveyance of the land to the Plaintiff was proved to have been made by the deceased ancestor.

On a review of the proceedings at the General Term, it appears to have been held that, although it was error not to permit the Plaintiff to be sworn, the judgment ought not to be reversed, because there could be no judgment for the Plaintiff without proof of a contract with the deceased, and, as he could not testify to any transaction with the deceased personally, his testimony could not have changed the result. The finding that no such contract was proved, necessarily showed that no testimony which he could give would entitle him to a decree for the conveyance of the land.

In the present state of our legislation upon the subject, a party to a suit is competent to testify on his own behalf. He may not testify to transactions had personally by himself with the deceased person whose representatives are defending an action, the cause whereof is alleged to arise out of the contract of the deceased with such Plaintiff.

The Plaintiff was therefore not a competent witness to prove directly a negotiation with the deceased, nor an agreement by the deceased to convey the land, nor to give any testimony to what happened in any mere transaction or interview with the deceased personally. This is not doubtful, nor do I understand it to be questioned in this appeal.

The refusal to permit him to be sworn as a witness was not sustained as a correct application of the rule, in the Court below; but it was held immaterial, on the ground that, as he could not testify to any transaction with the deceased personally, the refusal to permit him to testify wrought no prejudice. Not having proved the fact of a contract with the deceased, he could not supply the defect by his own testimony; and therefore he could not, whatever he testified, have had a judgment in his own favor.

This view of the subject proceeds upon one of two assumptions; either that the restriction that the Plaintiff may not testify to transactions had with the deceased personally, means that he may not testify to any facts which tend to show that a contract between him and the deceased was made, and was performed by him; or that it is not possible to conjecture that there are any such facts, which being proved, would warrant such an inference. While I think that, in a case of admitted error, the Court on review ought not to indulge in conjecture whether the error was prejudicial, and should reverse, unless it be beyond doubt that no harm to the party was possible, I am clear that both of the assumptions stated are erroneous.

The restriction in question is intended to prevent the party from testifying to the personal act, declaration, or conversation of the deceased. These are matters which, if he were living, he might explain, qualify, or contradict; but it does not prevent all testimony coming from the lips of the party which, if believed, might tend to establish the fact in issue, viz., that the transaction alleged to have taken place with the deceased did happen as alleged.

Illustrations may be suggested apt to the present case, which show that the Plaintiff might testify to facts not within the restriction, and yet which would warrant the inference that a contract for the conveyance of the land was made by the deceased.

And the pertinency of such illustrations is quite distinctly apparent, when it is observed that, in the Court below, the suspicion was deemed warranted that the Plaintiff's claim was an afterthought, gotten up after the decease of the ancestor, in reliance upon the disadvantage in the Defendants' position, in making proof unaided by the suggestions of the party by whom the contract was alleged to have been made.

The Plaintiff was, and had been for several years, in the occupation of the land in question. It is plain, I think, that there were many facts connected with such occupation not involving any transaction with the deceased personally, to which the Plaintiff might testify, and which, if true, tended to show that such occupation was as owner, in the expectation of receiving

a conveyance, and in the performance on his part of just such a contract for the conveyance as the Plaintiff alleged in his complaint. The manner of his occupation, the disposition he made of the proceeds of the farm to his own use, his expenditures thereon, the making of large and expensive improvements in the erection of buildings or otherwise upon the premises, his actual support of the wife of the deceased for several years (that being a part of the alleged consideration of the alleged contract),—these and other circumstances might influence the judgment of the Referee on the question whether he had been acting as owner, ad in expectation of a conveyance, and tend not remotely to an inference that some contract therefor existed.

Not only so, but the Court cannot say that, if sworn, he might not have testified to admissions by the Defendants themselves that such an agreement with the deceased, their ancestor, was made, and had been performed by the Plaintiff on his part. This would be clearly competent; and yet it would tend to prove a transaction, to wit, a contract with the deceased, of whom, in respect of the title to this land, they were the representatives.

In my judgment, therefore, it is not possible to say that the Plaintiff could not have testified, if sworn, to any fact material to his case. On this ground the judgment should be reversed.

The question whether husbands were competent to testify in behalf of their wives, or wives on behalf of their husbands, it is not profitable now to discuss. If a new trial shall be ordered herein, they will be competent to testify under the law which has been amended since the trial of this action.

Judgment of Supreme Court reversed, and new trial ordered, costs to abide the event.

JOEL TIFFANY,
State Reporter.

THOMAS PAIGE, PLAINTIFF IN ERROR, v. THE PEOPLE, DEFENDANTS IN ERROR.

WRIT OF ERROR dismissed for want of jurisdiction, on the ground that there was no final judgment rendered in the Court below upon which a writ of error could be based.

JOEL TIFFANY,
State Reporter.

THE WINSTED BANK, RESPONDENT, v. ARCHIBALD WEBB ET AL., APPELLANTS.

Promissory note—Usury—Original consideration.

The taking of usury, or including it in new notes by way of renewal of other valid notes, free from such taint, does not prevent a recovery of the sum actually due upon the valid notes, although the original notes were surrendered when the new notes were given.

Where a complaint alleged the making, etc., by the Defendants, of six notes, their non-payment at maturity, etc., and the giving of other six notes in renewal thereof, upon which the first six notes were surrendered, and stated that the Defendants alleged and claimed that the last six notes were void for usury; and the Defendants, by their answer, did set up such usury, and claimed the first six notes were paid and surrendered, and that the last notes were void for usury; the Plaintiff, in opening his case on the trial, admitted that usurious interest was included in the last six notes, whereupon a nonsuit was ordered. On appeal, held that this was erroneous.

The delivery of six notes which were void for usury was not payment and satisfaction of the six valid notes intended to be renewed thereby.

Upon the facts stated, the surrender of the first six notes was not a discharge of the cause of action, and the Plaintiff was entitled to recover the amount actually due.

APPEAL from an order of the Supreme Court in General Term in the Sixth District, reversing an order for a nonsuit, and ordering a new trial.

Usurious Contract—Valid security—Enforcement. 56 *N. Y.* 217; 64 *N. Y.* 298; 105 *N. Y.* 542 (8 *St. Rep.* 14; 26 *Week. Dig.* 426); 15 *Misc.* 425 (73 *St. Rep.* 60; 37 *N. Y. Supp.* 847).

Usury—What constitutes. 169 *N. Y.* 365; (32 *Civ. Proc.* 307).

Usury—As defense—To whom available. 15 *Hun,* 567.

Usurious security—Valid original debt—Enforcement. 7 *Hun,* 254; 8 *Hun,* 561; 20 *Hun,* 554; 24 *Hun,* 269 (41 *How. Pr.* 128); 25 *Hun,* 570; 31 *Hun,* 107; 59 *Barb.* 627; 65 *Barb.* 315; 4 *Daly,* 125.

Note—As payment. 6 *Hun,* 348; 5 *St. Rep.* 452 (25 *Week. Dig.* 558).

The complaint herein avers the making of six promissory notes by the Defendants, for $2,000 each, of various dates, payable three months after date, to the order of two of the Defendants, and by them endorsed to the Plaintiff. That on the 15th of December, 1857, after the maturity of all of the said notes, when there was due the whole principal thereof, together with interest upon each from the maturity thereof, the Defendants paid on account of said notes $426, and delivered to the Defendants other six notes, for $2,000 each, bearing various dates, payable and endorsed to the Defendant, like the first six, and for the same debt and considerations, except as to interest and the payment aforesaid, and as an extension of the time for the payment thereof; and thereupon the Plaintiff delivered to the Defendants the six notes first mentioned.

That the Defendants allege that there was included in the last-mentioned six notes a rate of interest which was usurious, and claim that, by reason thereof, they are not bound to pay either of the notes nor any part of the debt. That each of the notes was duly protested for non-payment, and notice thereof duly given to the endorsers.

That the Plaintiff has offered, and now offers, to return the last-mentioned six notes, or to cancel the same, but Defendants decline such offers.

That Plaintiff has demanded from the Defendants the said first-named six notes, but Defendants refuse to redeliver them.

The Plaintiff prays judgment (in substance) for $13,462.48, being the amount of the principal debt and interest to March 1, 1860, about the time the action was commenced, after crediting upon one of the notes the said sum of $426, and interest thereon accrued until final judgment.

The Defendants, by their answer, admit the making, endorsement, and delivery of all the notes. They aver that the first six notes were paid to the Plaintiff, who intentionally cancelled them, by erasing the signatures of makers and endorsers, and delivered them to the Defendants. That the second six notes were made and delivered upon an usurious agreement for interest, at the rate of twelve per cent. per annum. That

the Plaintiff had previously agreed to renew the first six notes; but when they were over-due, the Plaintiff required the usurious agreement as a condition of discounting the others or renewing the said first six notes, and, being unable to pay the latter, the Defendants were compelled to submit to such usurious and illegal exaction. By reason of all which, the said six notes severally named in the complaint were and are wholly void.

They admit the protest of all the notes for non-payment, and notice to the endorsers. And they claim that, by reason of the usurious agreement before stated, they are not bound to pay either of the notes, and that they refuse to pay the same or any part thereof.

They deny that, except by the complaint, the Plaintiff has offered to return the last six notes, or to cancel the same or either of them, or that they have declined such offer; and aver their willingness and desire to accept and receive the same; that they ever have been, and still are, ready and willing to accept and receive the same.

Finally, they deny any allegations in the complaint which they have not in their answer admitted.

The action was brought on for trial at the Circuit, and the Plaintiff's counsel stated, in opening, that the action was brought to recover the amount of the six promissory notes which had been marked cancelled, and surrendered by the Plaintiff to the Defendants, the Plaintiff taking in lieu thereof six other promissory notes of the like amount. That the Plaintiff, when it received the last notes, took more than seven per cent. interest or discount, which rendered them usurious and void; and hence the last notes did not operate as a payment of the first, and therefore, notwithstanding their surrender and cancellation, they had not been paid. That the Plaintiff now claims to recover the amount of them in this action, that being the amount of money originally loaned by the Plaintiff to the Defendants.

The Defendants then moved for a nonsuit, on the ground that, by the complaint and such opening statement, it appeared

that the original six notes had been cancelled and discharged, and that the other six notes are usurious and void.

The motion was granted upon the ground thus urged, and judgment of nonsuit was directed.

The exception thereto was ordered to be heard in the first instance at General Term, at which the nonsuit was set aside, and a new trial ordered.

The Defendants stipulated, and appealed to this Court.

John H. Reynolds for Appellants.
Samuel Hand for Respondents.

WOODRUFF, J.—The nonsuit having been granted in this case, upon the Plaintiff's opening, the facts stated in the complaint must be taken to be true as alleged, nothing having been conceded in such opening inconsistent with the allegations in the complaint, but, on the contrary, the statement upon which the nonsuit was ordered having in substance reiterated them.

It is perfectly settled, that the right to sustain the action upon the facts alleged does not depend upon the prayer for judgment. Any relief to which, upon the facts alleged, the Plaintiff is entitled, the Court should grant when the Defendant has appeared and answered. (Code, § 275; Emery v. Pease, 20 N. Y. 62; Marquat v. Marquat, 2 Kern. 341.)

The complaint shows that the Plaintiff, an endorsee, held six promissory notes, of $2,000 each, made by the Defendants, which were due and payable, and had been protested for non-payment; and the whole principal and interest, from their respective maturity, was due to the Plaintiff. That, as an extension of the time of payment, the Defendants gave to the Plaintiff, for the same debt, other six notes for $2,000 each, and paid $426, and the Plaintiff delivered to the Defendants the first six notes. The six notes last delivered as such extension of time of payment had become payable before the astion is brought, and have also been protested for non-payment.

Upon these facts it is clear that a sum of money, to wit, the amount of twelve thousand dollars (besides interest), less the $426, is due to the Plaintiffs from the Defendants. It became payable at the maturity of the first six notes. The time for payment was extended in part (whether by a binding contract or not) until the maturity of other six notes, but the debt has not been paid. Primâ facie, the last six notes are instruments by force of which the Plaintiff is entitled to recover, but it is not alone by force of these notes that such right of recovery exists; the primary cause and consideration of the indebtedness of which these notes are evidence has not been satisfied. The original evidence of the debt was surrendered, and other notes substituted; but the consideration of the latter is simply the indebtedness, which formed a complete ground of indebtedness before they were given.

It is not essential that the Plaintiff should determine by allegation whether it is by *force* of the first six notes, or by *force* of the second six, that he makes his claim. If, upon the whole transaction stated in the complaint, it is clear that the Plaintiff is entitled to have the Defendants a sum of money specified, there is a cause of action.

Although the counsel for the Appellants has argued with great ingenuity and skill in support of the nonsuit, and has insisted that the complaint does not state facts sufficient to constitute a cause of action, yet his first subordinate proposition is, that the complaint "sets out a good cause of action *on the last notes.*" And the alleged defect, therefore, lies in the supposed fact that "the action is *brought* on, as well as to recover, the amount of the *first* six notes."

It would seem to be enough to say, that the concession that the complaint sets out a cause of action on the *last* notes disposes of the point.

The fallacy of the reasoning is, that it assumes that the action is necessarily to be regarded as brought *upon* either set of notes, to the exclusion of any reference to the others. The action is to recover the debt; the amount of the first

six notes is the measure of the indebtedness. The notes successively have been given as evidence of the indebtedness.

It follows, that, so long as nothing appeared in the case except what the complaint alleged, there was a plain right to recover just what the Plaintiff claimed to recover. In that view the complaint may have contained matter which was wholly unnecessary; and the statement, that the Defendants alleged and claimed that the last notes were usurious, may have been unnecessary; but the substantial fact appeared, that the Defendants were indebted to the Plaintiff in the *amount* of certain six notes, on the surrender of which, they had given to the Plaintiff six other notes which were not paid.

What, then, was there in the opening statement by the counsel for the Plaintiff, in addition to the facts averred in the complaint? Simply this; an admission that the last six notes were usurious, and, therefore, void.

What is the legal effect of that admission? So long as it is law, that the giving of an usurious security for a valid debt does not destroy the debt, or the right to recover thereof, the only effect of the admission was to show that the Plaintiff could not recover by force of the last six notes; that the promise contained therein could not be enforced; and, therefore, that if the Plaintiff could recover at all, it must be for the valid indebtedness which subsisted when those six notes were given.

The argument of the Appellants, upon which alone the nonsuit proceeded, is: Although the Defendants were indebted to the Plaintiff, December, 1857, in the sum of $12,000 and upward, there can be no recovery thereof, because the six notes which constituted the ground and evidence of that indebtedness were surrendered and cancelled, and other notes taken for the same debt. There can be no recovery on the last notes, because they are usurious and void.

This reason overlooks two familiar rules. First, that a debtor, by giving his own notes, payable at a future day, does not satisfy his debt. If the new notes are not paid (whether valid or invalid), the creditor may proceed upon and

recover for the original indebtedness as if such notes had not been given; surrendering such notes on the trial. In such case he is none the less entitled, because he states in the complaint the facts constituting the original cause of action, and that such notes were given and not paid. Second, it overlooks the principle that an usurious extension of the time of payment of a valid debt does not impair the creditor's right to recover therefor. This is illustrated by the familiar practice, under our former technical rules of pleading, of declaring as for several causes of action in separate counts, when, in truth, but one existed; and when usury in the contract of extension appeared, obtaining a recovery for the original cause upon the count upon which it was described.

But it is said that the first notes being confessedly surrendered and cancelled, that operated as a final bar to any recovery upon them, or for the consideration thereof. This is unsound. The surrender and cancellation of a note may, or may not, operate as a bar to such recovery. That depends upon the intent of the transaction, and the consideration upon which it is done. The complaint and the opening statement here not only show no intent to release or discharge the indebtedness, but that the whole purpose was to continue its existence and recognition, with a new substituted evidence of the Defendants' liability therefor.

To the suggestion, that the usurer cannot set up his own usury as the ground of abandoning any claim to recover upon the last six notes, and recurring to the original debt, the answer is two-fold: First, whether the last six notes were usurious or not, the Plaintiff had the right, when payment thereof was refused, to recur to the original indebtedness. Second, it is the Defendants that avail themselves of the fact of usury.

The Plaintiff admits, it is true, that the usury alleged in the answer of the Defendants existed; but the Plaintiff's cause of of action in nowise depends upon that fact. The very ground upon which the Defendants insisted upon the nonsuit was, that according to the Plaintiff's admission the last notes were usurious. He stated his motion upon that fact. He cannot

complain that the Plaintiff thereupon says, If you deny the sufficiency of the last six notes to entitle me to recover, you drive me to my original cause of action, and that is valid. I admit the usury, but I seek no advantage therefrom. You may rely upon your answer, and my admission of its truth, or not, at your election. If you do not, then I am entitled to recover on two grounds; first, because I produce six notes containing your promise to pay; second, because they were given as substitutes for and in extension of other six notes which were valid and effectual, and, as you have not paid them, I am entitled to recover for the original cause. If you elect to rely on the admission, that I am entitled, because the taking of a usurious security does not destroy the right to recover for its original and prior valid consideration.

In short, the case is one which could not, probably, have arisen under our former technical rules of pleadings. Its peculiarity is exhibited, because now all the facts material to the recovery may be stated in one count or narration. The Plaintiff might, I think, safely have stated the fact, that the last notes were usurious; but that would not have made it any plainer, that, for the money due upon a valid contract, the Defendants were liable. The Plaintiff has set out twelve notes in his complaint, admitting the averring that the last six were given for, and as an extension of, the first six. Why, then, shall he not recover? Because he admits that the last six are usurious? That only remits him to his claim by reason of the Defendants' indebtedness according to the tenor of the first six. Because the first six were surrendered and cancelled? That does not extinguish the debt, if there was no actual satisfaction, and the substituted contract is not paid, but was void; and the Defendants insist on availing themselves of the admission to that effect.

It hardly seems necessary to cite authorities to these views; but those cited in the opinion of the Court below, and more fully by the counsel for the Respondent, seem to me to be quite conclusive, if the reasoning upon principle be not satisfactory. (See particularly, Rice v. Welling, 5 Wend. 595;

Hughes v. Wheeler, 8 Cow. 77; Vilas v. Jones, 1 Comst. 274; Hill v. Beebe, 3 Kern. 556, and cases cited; Gregory v. Thomas, 20 Wend. 20; Farmers and Mechanics' Bank v. Joslyn, 37 N. Y. 353.)

The order of the General Term of the Supreme Court granting a new trial must be affirmed, and judgment absolute rendered for the Plaintiff, in pursuance of the Defendants' stipulation.

All affirm.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

HARVEY M. SOULE AND GEORGE H. SOULE, APPELLANTS v. THOMAS B. CHASE, RESPONDENTS.

Insolvent Laws—Non-resident creditors—Dividend—Estoppel.

Creditors residing out of the jurisdiction of the State at the time the debt is contracted, are not to be affected in their rights by the insolvent laws of this State.

The fact that they seek to avail themselves of the Courts of this State to enforce their rights under such extra-territorial contract, does not render them amendable to the insolvent laws of this State.

But when a foreign creditor makes himself a party to a proceeding under the insolvent laws of this State which discharges the debt, and he accepts a dividend under the law, he is estopped from denying the regularity and validity of such proceedings.

CLERKE, J.—The objections taken by the Plaintiff's counsel at the trial, relating to the validity of the insolvent's discharge, do not show that the officer who granted the discharge had not jurisdiction. They related to points which he could decide at the hearing, and his decision would be conclusive. All the requisites necessary to give the officer jurisdiction were sufficiently proved.

At the trial of this action, the Plaintiff's counsel also, for

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Insolvent laws of state—Non resident creditors—Effect on. 44 *N. Y.* 599; 47 *Super. Ct.* 134.

the purpose of rebutting the effect of the discharge, offered to prove that the Plaintiff was a non-resident of this State at the time the debt was contracted; and it appeared that he was a non-resident when the proceedings to obtain the discharge were commenced. He never participated in, or sanctioned them, and he received no dividend, or any other benefit, after the discharge was granted. The judgment upon which this action is founded was recovered on the 12th of May, 1855; the Defendant obtained his discharge as insolvent on the 7th of November, 1859.

The Supreme Court of the United States has repeatedly held, that a discharge granted in one State cannot affect creditors who are citizens of another state. They hold such a discharge, as far as non-residents are concerned, to be in contravention of that provision of the Constitution of the United States which declares that no state shall pass a law impairing the obligation of contracts. (Art. 1, § 10.)

In Hicks *v.* Hitchkiss (7 Johns. Ch. 279), Chancellor Kent delivered an elaborate opinion on this subject, referring to the well-known case of Sturges *v.* Crowninshield (4 Wheaton, 122), and to cases decided by the Courts of this and other States; and he came to the conclusion, that a discharge of this nature is not a bar to a suit here upon a contract made, or debt incurred, between parties in another State, and residing there at the time.

In Van Hook *v.* Whitlock (26 Wend. 43), this subject was very fully discussed in the Court for the Correction of Errors, by the Chief Justice. He referred also to Sturges *v.* Crowninshield, and to Ogden *v.* Saunders (12 Wheat. 213), showing that in the latter it was held that, as between citizens of the same State, the discharge is valid, as far as contracts made posterior to the law are concerned; but, as against citizens of other States, it is void as to all contracts, wherever made.

In Clay *v.* Smith (3 Peters, 411), it was, however, held, that if the creditor voluntarily makes himself a party to the proceedings under a State insolvent law which discharges the debt, and accepts a dividend under the law, he will be bound

by his own act, and be deemed to have abandoned the extra-territorial immunity.

In the case before us, it is admitted that the creditors were non-residents at the time the debt was incurred, and were non-residents at the time the proceedings to obtain the discharge were commenced. The only particular in which it differs from cases to which I have referred to is, that the creditor (the Plaintiff) commenced an action in a court of this State, to recover the debt; and upon the judgment recovered in that action they instituted the action now before us. It is contended in behalf of Defendant, that, by resorting to a Court of this State, they should be deemed to have abandoned the extra-territorial immunity; but it seems to me that the decision of this Court in Donnelly *v.* Corbett (3 Seld. 500) disposes of that position. The debt there was incurred by a citizen of South Carolina, to merchants residing in this State; the Plaintiff (the survivor of the firm) brought an action in the Court of Common Pleas of the Charleston District, in the State of South Carolina, and recovered a judgment on the 22d of April, 1843. On the 11th March, 1844, the debtor obtained a discharge from his debts under an insolvent law of that State. It was expressly held by this Court, in an action commenced in the Court of Common Pleas of the city of New York to receive this debt, that the resort of the Plaintiff to a Court of the State of South Carolina did not divest him of his extra-territorial immunity, so as to prevent him from objecting to the subsequent discharge of the debtor under the insolvent laws of that State.

So the Plaintiff in the case before us, being a non-resident when the debt was incurred, and when the insolvent proceedings were commenced, was not divested of his extra-territorial immunity by resorting to a Court of this State; and the discharge is not available against them.

The judgment should be reversed; new trial; costs to abide event.

Judgment reversed.

JOEL TIFFANY,
State Reporter.

THOMAS W. OLCOTT, RESPONDENT, v. THOMAS B. CARROLL, APPELLANT.

Pleading—Complaint—Demurrer—Interpretation.

Where the language of a complaint is susceptible of an interpretation which will set forth a good cause of action, that interpretation is to be accepted rather than the one which will render the pleading invalid.

When a joint owner receives the whole money due on a joint contract, an action will lie in the name of the other owner, for his share of the money thus collected.

THIS is an appeal from a judgment of the General Term of the Third Judicial District, affirming a judgment in favor of the Plaintiff against the Defendant for the sum of $4,728.79, entered upon the 31st day of March, 1863.

The Defendant demurred to the complaint, on the ground of insufficiency. This demurrer was overruled at Special Term, and leave given to answer within twenty days, on serving affidavit of merits.

The Defendant appealed from this order to the General Term. The order was affirmed, and the Defendant having failed to answer, the judgment above mentioned was entered and affirmed on appeal to the General Term.

The complaint alleged that on the 9th of March, 1852, for a valuable consideration, Thurlow Weed and others executed and delivered to the Defendant an agreement in writing [setting it forth]. This agreement was an assignment to the De-

Pleading—Construction—Indefiniteness allegations. 42 *N. Y.* 86; 12 *Hun,* 568; 16 *Hun,* 265; 11 *App. Div.* 335 (42 *N. Y. Supp.* 1114); 25 *App.* 444 (49 *N. Y. Supp.* 631); 10 *Misc.* 29 (63 *St. Rep.* 243; 30 *N. Y.* 1053); 11 *Misc.* 218 (66 *St. Rep.* 566; 32 *N. Y. Supp.* 1112); 17 *Misc.* 359 (39 *N. Y. Supp.* 1087); 19 *Misc.* 615 (44 *N. Y. Supp.* 424); 56 *How. Pr.* 171; 21 *Abb. N. C.* 467 (2 *N. Y. Supp.* 30); 17 *St. Rep.* 18 (2 *N. Y. Supp.* 30).

fendant of a certain fixed interest in a certain contract with the State for the publication of the Colonial History.

It further alleges that the Defendant, on the 9th of October, 1852, for a valuable consideration, assigned by writing to George R. Davis "one-half of all his right, title, and interest, of, in, and to the contract of which the foregoing is a copy."

That on the 19th of February, 1861, the said Davis, in writing, for a valuable consideration, assigned to the Plaintiff all his right, title, and interest to said contract, with all money to be derived therefrom, and empowered the Plaintiff to sue for and collect all money due said Davis by virtue of said contract, and "of the assignment by said Carroll to said Davis of one-half of his (said Carroll's) right, title, and interest, of, in, and to said contract."

It then alleges that Carroll had received from Weed & Co., "under and by virtue of their said agreement and contract with said Carroll, hereinbefore set forth, the following sums of money, stating them in detail, to the amount of $6,521.98, as and for and on account of his right, title, and interest, of, in, and to said contract, hereinbefore set forth."

It then alleges that, by virtue of the provisions of the assignment stated, the said Plaintiff is entitled to have and receive from said Carroll, and to sue for and collect from said Carroll, one-half of the sums so received by said Carroll, with interest from the time of receipt. That he had demanded them from him, and he had refused to pay over or account for the same, or any part thereof. It concludes by demanding judgment for the said Davis, and interest.

A. Bingham for Appellant.
Saml. Hand for Respondent.

BACON, J.—This appears to me to be a very simple case, and was properly disposed of at the Special Term.

The demurred is founded on a misconception or perversion of the allegations of the complaint. When fairly construed, the complaint contains no averment that the Defendant had re-

ceived certain sums of money on account of his interest in the contract, as distinguished and separate from the interest of the Plaintiff therein, and therefore setting up a claim to the half to which Defendant was entitled, and not his own.

This would be to make the claim presented by the complaint not only unreasonable, but absurd, and we are not to give a construction to language susceptible of another and a reasonable interpretation, which would lead to such a result. When, therefore, the complaint alleges that the Defendant received certain sums of money first on account of his right, title, and interest in and to the contract therein set forth, it manifestly refers to the whole contract, and not to a partial interest therein, and this construction is confirmed and made entirely clear by the subsequent averment that the Plaintiff was entitled to have and receive from the Defendant one-half of the sum as received by him.

The statement of the case is this: The Plaintiff owned one-half of the Defendant's interest in the contract, which he had acquired by assignment from Davis, to whom Defendant assigned one-half of his interest.

On account of Defendant's interest, as distinguished from that of the other parties to the contract,—Weed and others,—Defendant had received certain sums of money, all of which, by the way, had been received before he assigned to Davis; and the one-half of these moneys, which is precisely the interest the Defendant had assigned to Davis, and Davis to the Plaintiff, the Plaintiff claims to recover in the complaint.

There is no element of partnership here in such a sense as requires an accounting, &c., a balance to be struck, or an express agreement to pay. The Defendant stands precisely in the position of one of the joint holders of a specific demand or chose in action, who receives money in the interest of or for the benefit of both, and becomes liable by a promise implied by law to pay over the share to which the other is entitled.

The judgment should be affirmed, and be absolute in not allowing to the Defendant the privilege which was accorded to him at the Special Term, to answer upon payment of costs.

WOODRUFF, J.—The only question raised by the demurrer to the complaint in this action is whether the averment—"that the Defendant has received from Weed and others, under and by virtue of their agreement with the Defendant, hereinbefore set forth, the sums of money specified as paid for and on account of his right, title, and interest of, in, and to said contract, hereinbefore set forth"—states a fact which entitles the Plaintiff to recover from the Defendant.

The contract referred to entitled the Defendant to receive from Weed and others six per centum of certain amounts to accrue from the publication of the Colonial History. That was his right, title, and interest in and by force of that contract.

If the allegation in question, when read in connection with the other facts of the complaint, and reasonably interpreted, means that the Defendant has received the moneys on account of and for that right, title, and interest, then the allegation is sufficient. In my opinion it may be reasonably so read. Indeed, I think that no one can read the complaint as an entire statement without so understanding it.

The expression, "his right, title, and interest," is twice before, in paragraphs immediately preceding, used in exactly the sense of the whole interest accruing to the Defendant by virtue of that contract. In the clause immediately preceding, it is stated that the Plaintiff is, by assignment from Davis, empowered to sue for and collect all moneys due to Davis by virtue of said contract, and of the assignment to Davis by the Defendant of one-half of his right, title, and interest of, in, and to said contract, and then avers "that the Defendant has received from Weed and others $500, and other specified sums, as paid for and on account of his right, title, and interest of, in, and to said contract, hereinbefore set forth."

It is an intelligible, and, I think, the most natural construction, to regard the words "hereinbefore set forth" as referring to "his right, title, and interest" before mentioned; that is to say, his right, title, and interest under the contract with Weed

and others, whereof one-half had been assigned by the Defendant to Davis, and by him to the Plaintiff.

The language is clearly susceptible of this interpretation, and if so, that interpretation should be given in preference to one which leads to the absurdity of construing the complaint as an averment that the Defendant has received moneys exclusively his own, in which the Plaintiff has no interest.

If the allegation admits of the latter interpretation, it may be said to be ambiguous, and that is all.

It is not true that, under the Code, if there be uncertainty in respect to the nature of the charge, it is to be construed strictly against the pleader.

By § 159, in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice; and by § 160, when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge is not apparent, the Court may require the pleading to be made definite and certain by amendment.

I think the demurrer was properly overruled, and that the judgment should be affirmed.

All affirm.

JOEL TIFFANY,
State Reporter.

LEWIS F. ALLEN AND OTHERS, RESPONDENTS, v. THE CITY OF BUFFALO, APPELLANT.

Tax Sale—Certificate—Cloud on title—Equitable relief.

A certificate stating that a majority of those interested in all the different and several kinds of work to be done have petitioned, is not a compliance with the requirement that a majority of those interested in paving and grading should petition.

When a certificate of a tax sale is presumptive evidence of the facts therein contained, and is evidence in the Defendant's possession of a legal assessment and valid sale, such certificate is a cloud upon the title of one holding adversely thereto, and equity will interpose to give relief.

David F. Day for Appellant.

Geo. Wadsworth for Respondents.

MASON, J.—The assessment in question was illegal. (Laws of 1856, p. 143, § 20.) That certificate is substantially defective. The charter requires that a majority of those interested in paving and grading should petition. The certificate duly states that a majority of all those interested in all the different and several kinds of work to be done have petitioned. This certificate might be true, and yet not one of the persons interested in the paving and grading, for which alone the petition is necessary, have joined in the petition.

This question has been decided in this Court, in the cases of Lathrop *v.* The City of Buffalo, and Dolan *v.* The Same. The only question in the case is, whether the assessment of this tax, and the sale of the premises to pay the tax, and the issuing of the certificate of sale to the Defendant, created such a cloud upon the Plaintiff's title as justifies a Court of Equity to interpose.

Cloud on title—Removal—What must appear. 40 *N. Y.* 549; 48 *N. Y.* 187; 63 *N. Y.* 134, 492; 67 *N. Y.* 536; 69 *N. Y.* 514; 95 *N. Y.* 484; 70 *Hun,* 424 (53 *St. Rep.* 689; 24 *N. Y. Supp.* 466); 63 *Hun,* 274 (43 *St. Rep.* 759; 17 *N. Y. Supp.* 903); 37 *Super. Ct.* 581; 56 *Barb.* 360; 44 *How. Pr.* 338; 6 *Lans.* 191; 47 *St. Rep.* 666 (20 *N. Y. Supp.* 333).

Assessment—Vacation—Regularity. 19 *App. Div.* 45, 46 (46 *N. Y. Supp.* 1055).

The question is easily answered by reference to a few provisions of the Defendant's charter, and the well-settled rules of equity. In the first place, the charter makes the assessment a lien upon the lots, and it is provided by the thirty-ninth section of title five, that it shall not be necessary, in any proceeding for the collection of any tax, *or in any suit or proceeding in which such tax shall come in question, to prove the validity thereof, or the regularity of any of the proceedings by which the same shall have been imposed, but said tax shall be deemed to be valid, regular, and conclusive, &c.* (Laws 1853, p. 483, § 39.) And the twenty-fourth section of the same title declares, that the certificate of sale shall be presumptive evidence of the facts stated therein. (Laws 1853, p. 480, § 24.)

This certificate of the sale is required to contain a description of the property and the term for which it was sold, and the particular tax, and the amount thereof, with the interest and expenses for which the sale was made, and the time when the right to redeem will expire. (Laws 1853, p. 477, § 16.) The owner of the land must redeem by paying, &c., within three months after receiving notice; and if he do not, the Common Council are directed, and it is their duty, to issue a declaration in writing to the purchaser, under the corporate seal, signed by the Mayor and attested by the Clerk, containing a description of the premises, the fact of the assessment, advertisement and sale, and the period for which the premises were sold; and which declaration may be recorded as a lease of real estate. (Laws of 1853, p. 477, § 18.)

This same section declares that this declaration shall be *presumptive evidence, in all courts and places, that such* tax or assessment was legally imposed, and that due proceedings to authorize such sale were had. This lease was not issued when this suit was commenced; but the assessment and sale were all proved by the certificate of sale, and the charter makes such certificate presumptive evidence of the facts therein contained, and is evidence in the Defendant's possession of a legal assessment and a valid sale; and consequently the tax, being a lien upon the lots, creates a cloud upon the Plaintiff's title;

and as the Defendant is relieved from showing the assessment whenever he has the certificate, and when he gets his lease may stand upon that alone, it presents a case for equitable relief, the rule being, that when the claim of the adverse claimant to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved to establish the illegality or invalidity, when a Court of Equity will interpose to remove the cloud (Ward *v.* Dewey, 16 N. Y. 519, 522; Scott *v.* Onderdonk, 14 id. 9); and I am not able to distinguish the case of Scott *v.* Onderdonk from the case at bar. It decides the very question presented by this appeal, and I cannot think it has been overruled by this Court.

The case of Howell *v.* The City of Buffalo should not be regarded as overruling the case of Scott *v.* Onderdonk, as it certainly would overturn the well-settled rule in equity, and overrule a long line of decisions in this State without reviewing or considering them; and as the case has been withheld from the reports, we ought to follow the case of Scott *v.* Onderdonk, which is sound, and fully sustained by the prior cases.

The Defendant cannot have any benefit from the objection taken here, that there is a defect of parties plaintiff, as he has not specified this as a ground of demurrer. (Code, § 144.) The demurrer must distinctly specify the ground of objection to the complaint, and the penalty of the omission is, it will be disregarded if he do not. (Code, § 145.)

The judgment should be affirmed.

MILLER, J.—This action was brought to set aside certain assessments levied upon the lands of the several Plaintiffs, to defray the expenses of paving and grading Niagara Street, in the city of Buffalo, and for other purposes; which assessments are alleged to have been illegally made. The main question presented is, whether an action in the nature of a bill quia timet can be maintained to restrain the Defendant from taking any proceedings to collect such assessments.

It is insisted by the Defendant's counsel, that the question now raised has been decided adversely to the Plaintiffs in the case of Howell v. The City of Buffalo. The case is not reported, but we have been furnished with a copy of the opinion of Mr. Justice Mason, which is relied upon as decisive of the question involved. The learned Judge holds, first, that a remedy exists by a common law certiorari to correct errors of this description, and when this remedy clearly exists, that equity will not entertain jurisdiction; second, the Plaintiffs had no common or joint interest in any of the parcels of land upon which the assessments were severally levied, and they could not unite in an action; and that the subject-matter of the action being land, every Plaintiff must be interested in the same piece of the land affected.

On the part of the Plaintiffs it is contended, that the learned Judge has manifestly, in his opinion, overlooked the case of Scott *v.* Onderdonk (14 N. Y. 9), which holds that if the instrument be void upon its face, or defective for the want of preliminary proceedings, the owner cannot maintain the action. But, where it is made presumptive evidence that such proceedings were had, the action lies. In the case of Howell *v.* The City of Buffalo, the learned Judge assumed that the declaration required by the eighteenth section of the fifth article of the charter would recite in brief the facts connected with the assessment; and that the facts thus recited would disclose, that it did not appear that a maojrity of those liable to pay for the improvement solicited, and for which it was necessary to apply to the Common Council, had united in the application.

By the section of the act cited, if the land sold is not redeemed the purchaser is to have a declaration of sale, containing certain statements, which is to be presumptive evidence that the tax or assessment was legally imposed, and that due proceedings to authorize the sale were had; but it does not provide that it shall show what the learned Judge deemed essential, and therefore its invalidity would not appear upon the face of the declaration itself, and proof aliunde, that instrument would not be required to establish title. Another sec-

tion, thirty-nine of the act, provides, "that it shall not be necessary in any suit or proceeding for the collection of, or in which, such tax or assessment shall come in question, to prove the validity thereof, or the regularity of any of the proceedings by which the same shall have been imposed; but said tax or assessment shall be deemed to be valid, regular, and conclusive, subject to the right of any party to show to the contrary by affirmative evidence." It would seem that the declaration proves itself, and, primâ facie, is evidence of title, liable to be assailed by affirmative evidence that the tax is illegal and void. If this is so, then the action lies.

In the case of Scott v. Onderdonk, the land had been sold for the non-payment of a void assessment, but no conveyance or declaration of sale had been made. The Brooklyn charter provided that the conveyance, when made, should be primâ faci evidence of the facts therein recited and set forth; but it does not appear that the assessment was presumed to be valid, or that the certificate of sale was in any way evidence of the facts therein stated, or that the declaration of sale was evidence in any proceeding other than that for the recovery of the premises. The case is not as strong as the one before us, and it is, I think, apparent that the learned Judge in Howell's case did not give it the consideration to which it is entitled; and as it stands as authority, never having been overruled or considered, it is decisive of the principle here involved.

The parties subsequently brought in, by the order of the Court, as Plaintiffs, would seem to be proper parties to the action, as the order has never been appealed from, and has been sanctioned and made lawful by subsequent legislation. (Laws of 1865, 635, § 1.)

A number of suggestions are made by the Appellant's counsel, which do not, I think, affect the final determination of the case. It must be disposed of on the one to which I have adverted, and therefore I have not deemed it necessary to discuss them.

The judgment must be affirmed.

All concur.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

HENRIETTA MAILLE, RESPONDENT, v. SAMUEL LORD AND OTHERS, APPELLANTS.

False Imprisonment—Justification—Liability of Master for trespass of servant.

It is no defence in an action of trespass and false imprisonment to show that those charged with committing the trespass acted in the matter in the utmost good faith, and arrested and searched the Plaintiff supposing her to have been guilty of committing a larceny. The calling to one's aid a policeman, to arrest and search the person of the Plaintiff without warrant, furnishes no excuse for the trespass. But when the trespass is committed by the servants or clerks of the Defendants, without their knowledge or direction, they are not to be deemed as acting under the employment of the Defendants so as to make the Defendants liable. It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act which the master himself is not authorized to do.

ACTION to recover damages for an alleged illegal arrest and imprisonment of the Plaintiff by the Defendants, and compelling her to submit to be searched for the discovery of a dress, claimed to have been stolen by the Plaintiff from the Defendants, and concealed upon her person.

The answer in substance denied the complaint.

Upon trial of the issue before a jury, it was proved that the Defendants were partners in the mercantile business in New York, and had three stores in which goods were kept for sale, one of which was upon Grand Street; that at this store they employed a large number of clerks and also some females in their business there, and a superintendent of the establishment; that the Plaintinff went to the store to purchase goods, and made some purchases; that the superintendent called in a policeman, and directed the clerk with whom the Plaintiff was trading to request her to go down stairs; that she, with some reluctance, complied, and was followed by the clerk, superintendent, and policeman; that the other persons were excluded from the room, and then the Plaintiff was requested to give up the dress she had concealed upon her person; that Plaintiff denied having any dress concealed; that a partial search was

made and no dress found; that the superintendent called a female, who was directed to retire with Plaintiff and search her; that this was done, and nothing found, and then Plaintiff was permitted to depart.

There was no evidence that either of the Defendants were at the store at the time, or had any knowledge of, or gave any authority for, this transaction, except what might be implied from their employment of the clerk and the superintendent for the transaction of their business in that store.

After proving the above facts, and introducing evidence as to the effect produced thereby upon her health, the Plaintiff rested. The Defendants' counsel moved for a dismissal of the complaint, upon the following among other grounds; that the acts complained of were not shown to have been committed by Defendants, or by their authority, but to have been wilful trespasses, for which they were not liable. The motion was denied.

The Defendants introduced witnesses to prove various facts, among whom were each of the Defendants, who severally testified that he was not at the store at the time, and had no knowledge of, and gave no authority to the superintendent or any other person for committing any of the acts charged by the Plaintiff. The superintendent, upon these points, testified the same as the Defendants.

Various exceptions were taken by the Defendants to the rulings of the Judge upon the trial, and also to his charge and refusals to charge. The jury rendered a verdict for the Plaintiff of $4,000, upon which judgment was rendered, and the same affirmed, upon appeal, by the New York Common Pleas, from which the Defendants appealed to this Court.

C. L. Spilthorn and *J. B. Fogarty* for Respondent.

J. Graham for Appellants.

GROVER, J.—The question whether the Plaintiff was detained and searched against her will, was conclusively settled in her favor by the verdict. The evidence fully warranted the

submission of this question to the jury. There was no prosecution against the Plaintiff instituted. Calling in the policeman, and informing him of the suspicion entertained against the Plaintiff, and of the facts upon which it was grounded, had not the semblance of a criminal prosecution, and, consequently, whether these and the subsequent acts were done in good faith on the part of the superintendent, or maliciously, was only material upon the question of damages, provided the Defendants were liable therefor.

The utmost good faith, and the firmest belief, that a person has stolen, and secreted about his or her person goods, will not justify the owner in detaining and searching the suspected person; consequently, the acts of the superintendent of the Defendants cannot be justified upon these grounds, nor this action barred, if the Defendants are responsible for his acts in this respect. Calling in the policeman, and his presence and participation, afford no justification. The policeman had no right to order the search of the Plaintiff by the female, and he could confer no power upon any one to search. The exceptions taken to the Judge's ruling upon these questions were correct.

The material question upon the merits is, whether the Defendants were liable for these acts of their superintendent. A master is responsible, civilly, for the fraud, negligence, or other wrongful act of his servant, committed in the transaction of his business. This is the general rule. (Griswold v. Haven, 25 N. Y. 526, and cases cited.) He is not responsible for the wilful injury committed by the servant while so engaged, unless such injury results from the business transacted by the servant for his master. (Wright *v.* Wilcox, 19 Wend. 343, and cases cited; Hibbard *v.* The N. Y. & Erie R. R. Co., 15 N. Y. 455.)

In the former case, it was held that the master was not responsible for an injury caused by his servant in wilfully driving his wagon over a person; that, in doing such an act wilfully, the servant was not engaged in his master's business, but had, in respect to this act, departed therefrom.

In Griswold v. Haven (supra), it was held that the principal was responsible for the fraud of his agent, committed in transacting the business of the principal.

In Sanford v. The Eighth Avenue R. R. Co. it was held, that the master was responsible for the act of his servant in wrongfully ejecting a passenger from the train, and responsible, also, for any acts of aggravation in doing the act causing an injury to the passenger.

This judgment was based upon the principle that a part of the duties of the servant was to exclude from the cars such passengers as refused to pay fare, or to comply with the regulations adopted by the company; and that, having authority from the master to perform such acts, all such acts done by the servant were to be regarded as done by virtue of his authority, and in the execution of the master's business, and that, consequently, the master was liable for all injuries sustained from the wrongful acts of the servant in their performance.

Applying these principles to the present case, the inquiry is, whether a merchant, by employing a clerk to sell goods for him in his absence or a superintendent to take the general charge and management of his business at a particular store, thereby confers authority upon such clerk or superintendent to arrest, detain, and search any one suspected of having stolen and secreted about his person any of the goods kept in such store. If he does, he is responsible for such acts of the clerk or superintendent. If not, then such acts are not within the scope of the authority delegated to the superintendent, and the employer is not responsible therefor, for the reason that, while in their performance, the servant is not engaged in the business of the master, any more than in committing an assault upon or slandering a customer.

In examining this question it must be assumed that, by the employment, the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property; to protect it against thieves and marauders; and that the servant owes the duty so to protect it to his employer. But this does not include the power in

question. It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself, if present.

The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods and secreted them upon his person. The authority of the Defendants to the superintendent could not, therefore, be implied from his employment. The act was not done in the business of the Defendants, and they were not, as masters, responsible therefor. If not responsible, if the superintendent acted in good faith in the belief of the Plaintiff's guilt, they clearly would not be if he acted from malice, in the absence of such belief. The Plaintiff having, at the time of resting, given no evidence connecting the Defendants with the clerk and superintendent, except their employment by the former, the motion of Defendants for a dismissal of the complaint should have been granted by the Judge, and the exception to his refusal was well taken.

The attempt in the answer to justify the act was no evidence against the Defendants upon the issue presented by the denial of having committed the acts. The only remaining question upon this part of the case is, whether, at any subsequent stage of the trial, the defect in the Plaintiff's proof was supplied. All the evidence given, having any such tendency, was the answer of one of the Defendants to the question: "Has it not occurred sometimes in your store, that your clerks have arrested persons suspected of having purloined goods?" To which the witness answered: "I believe it is very likely;" and to the further question: "Whether done by authority of the foreman?" To which he answered: "Not by my authority as one of the firm. I never gave any such instructions;" and his answer to a further question, "that he had never witnessed such an occurrence." This was clearly insufficient to charge the Defendants.

The judgment must be reversed upon the exception to the Judge's refusal to grant the motion to dismiss the complaint. The other exceptions it is unnecessary to examine.

Judgment reversed.

JOEL TIFFANY,
State Reporter.

GEORGE W. HURST AND JAMES COBURN, RESPONDENTS *v.* ELISHA C. LITCHFIELD, APPELLANT.

Agreement to submit to arbitration—Bar—Complaint—Common counts.

An agreement in a written contract for building, that, in case any question arose under the contract between the parties in relation to the value of the work performed, it should be referred to and determined by the architect, is not such an one as will change the rights of the parties to apply to Courts of Justice for redress.

Such stipulations are regarded as against the policy of the Common Law, as having a tendency to exclude the jurisdiction of the Courts established, etc., and provided with the means to entertain and decide legal controversies.

When the contract has been fully performed, and nothing remains to be done but to pay over the money, an action on the common counts can be maintained.

THIS action was brought to recover for work and labor performed by the Plaintiffs, as carpenters, in erecting an addition

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Contracts—Breach—Submission to arbitrators—Ouster of courts. 50 *N. Y.* 265; 13 *Hun,* 614, 18 *Hun,* 100; 39 *Hun,* 46; 86 *Hun,* 381 (67 *St. Rep.* 225; 33 *N. Y. Supp.* 513); 25 *App. Div.* 487 (49 *N. Y. Supp.* 732); 12 *Misc.* 399 67 *St. Rep.* 594; 33 *N. Y. Supp.* 693; 24 *Civ. Proc.* 381). 57 *How. Pr.* 224; 33 *Super Ct.* 369; 6 *St. Rep.* 605.

Complaint—Sufficiency—Assumpsit—Common counts. 4 *Misc.* 77 (53 *St. Rep.* 173; 23 *N. Y. Supp.* 599); 15 *Abb. N. C.* 303 (1 *How. N. S.* 309); 4 *Civ. Proc.* 121; 13 *Daly,* 87.

Contract—Performance—Conditions precedent—Waiver. 4 *Hun,* 653 (6 *T. & C.* 696); 37 *Hun,* 416; 50 533 (20 *St. Rep.* 821; 3 *N. Y. Supp.* 711); 47 *Super Ct.* 310.

to the dwelling-house of the Defendant, and repairing the same. The Referee found in favor the Plaintiffs $220.35, upon which judgment was entered, and the Defendant appealed to the General Term of the Supreme Court, where the judgment was affirmed, and from which the Defendant has appealed to this Court.

The Plaintiffs entered into a written agreement to do all the carpenters and joiners' work in the erection and completion of an addition to the dwelling-house of the Defendant, in the village of Cazenovia, according to plans and drawings made and to be made by N. H. White, the architect, and according to directions given from time to time; the Defendant to furnish materials, etc., and to pay the Plaintiffs $1,480 therefor.

The Defendant reserved the right to modify or change the building without in any way violating the contract, and the Plaintiffs agreed to carry the same into effect, and, if the change should be more expensive than the plans, the Defendant was to pay the difference, and if less, the amount was to be deducted.

The agreement contained the following stipulation: "And it is understood by the parties hereto, that in case any question arises under this contract in relation to the work, both as to value of work added or deducted, the same shall be adjusted, by the aforementioned architect, and his decision shall be binding on both parties, and be final." No question is made but the building was completed according to the contract. The Defendant admitted that the work was done named in the bill of particulars produced by the Plaintiffs to Court, and marked "Plaintiffs' Exhibit B," but denied the value of the services, and reserved the right to object to the value of the services when proof of value was offered.

It was admitted upon the trial that the Plaintiffs had been paid $1,530 toward the work.

After the Plaintiffs had rested, the Defendant's counsel moved that the Plaintiffs be nonsuited and their complaint dismissed, upon the ground that the adjustment and settlement

of the value of the work was a condition precedent to Plaintiffs' right to sue and recover for the same. That such adjustment not having been made by the architect, no cause of action had accrued to the Plaintiffs at the time the action was commenced, and has not yet accrued, and therefore the action could not be maintained, which motion was denied by the Referee, and to which Defendant's counsel excepted. And after the evidence was closed the Defendant's counsel insisted before said Referee that Plaintiffs were not entitled to recover under the complaint, the counts being general upon a quantum meruit and not upon the special agreement; and what was called extra work was as much within the written agreement as any other portion of the work, the price or value to be adjusted by the architect, and, when so settled, the Plaintiffs were bound to bring their action for its recovery upon the special agreement, and could not recover under the complaint, and that the complaint should be dismissed, etc.

The Referee found, among other things, as matter of fact, that the demand of payment of said claim had been made before the commencement of this action by the Plaintiffs of the Defendants. The Referee further found, that, as a question of fact, no question ever arose under this contract between the parties in relation to the value of the work added, and he found that the Plaintiffs were entitled to recover, on account of said claim unpaid, $220.35.

Wm. J. Hough for Appellant.
Geo. W. Gray for Respondent.

MASON, J.—The Referee having found that no question ever arose under this contract between the parties in relation to the value of the work, and there being evidence in the case to sustain such finding, we must receive the finding of the Referee as conclusive upon this Court as to this fact. The objection, therefore, that this action cannot be maintained because this matter had not been submitted to the architect, and his adjustment procured, is not well taken.

There is, however, another answer to this objection. This agreement to submit this matter to the decision and adjustment of Mr. White constitutes no bar or defence to this action; in the first place, the agreement itself does not make this a condition precedent. Such stipulations are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the Courts provided by the government with ample means to entertain and decide all legal controversies. (Scott *v.* Avery, 5 House of Lords cases, 811; Horton *v.* Sayer, 4 Hurlst. & Norm. 643; Thompson *v.* Charnock, 8 Term, 139; Greason *v.* Keteltas, 17 N. Y. 491, 496.)

These stipulations are often in articles of copartnership, and the law is well settled that they do not deprive the party of his action, either at law or in equity, to enforce his rights. It is well settled that Courts of Equity will never entertain a suit to compel parties specifically to perform such agreements. (Gourlay *v.* Duke of Somerset, 19 Ves. 431; Agar *v.* Macklew, 2 Sim. & Stu. 418; Greason *v.* Keteltas, 17 N. Y. 496.)

Gow says that one partner may maintain an action at law against his copartner, notwithstanding it has been agreed between them that the matter in dispute shall be determined by an arbitration, because a mere agreement to submit cannot oust the Superior Courts of their jurisdiction. (Gow on Partnerships, 103, citing Kill *v.* Hollister, 1 Wils. 129; Thompson *v.* Charnock, 8 Term, 139.)

These cases fully sustain the text, and in the latter case Lord KENYON, Ch.J., said: "It is not necessary now to say how this point ought to be determined if it were res integra, it having been decided again and again that an agreement to refer all matters in difference to arbitration, is not sufficient to oust the Courts of Law and Equity of their jurisdiction."

In the case of Kill *v.* Hollister there was a stipulation on an insurance policy to submit all difference, etc., to arbitrators, and the Court held it no bar to an action at law upon the policy brought to settle the differences. The rule is reiterated

very much in the same terms by Collyer. (See §§ 250, 251, 252, 253, pp. 230, 231, 4th Am. ed. from the 2d Eng. Ed.) He concludes the discussion of the subject in § 253, in saying that such a covenant to refer disputes to arbitration is but an unprofitable covenant, affording only the shadow of relief at law, and neither substance nor shadow in equity. (Collyer on Part. 231, § 253.)

The same is affirmed in the strongest terms by Story in his Treatise on Partnerships, § 215, p. 324, 325 to 330, and also in his Equity Jurisdiction, vol. 1, p. 744, § 670. This case of Haggart *v.* Morgan (1 Seld. 427) holds the same, and so does Sinclair *v.* Tallmadge (35 Barb. 607). The rule is the same whether the arbitrator be named and agreed upon or not, as is held in several adjudged cases. Where an agreement makes the procurement of the architect's certificate a condition precedent to any right of action, then the rule is as claimed by the Defendant in this case; but such is not the agreement between these parties.

There is nothing in the objection that Plaintiffs are not entitled to recover under their complaint as framed. The contract being fully performed and completed, and the money due, the Plaintiffs, under the old rule of pleading, were entitled to recover upon the counts for work and labor, and are so under the present system. (Allen *v.* Patterson, 3 Seld. 476.) But the second count or cause of action stated in the complaint is quite a sufficient statement of the Plaintiffs' cause of action. It is a concise statement of the facts constituting the Plaintiffs' cause of action. The judgment must be affirmed.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

CHARLES DURAND ET AL., RESPONDENTS, v. WILLIAM H. HANKERSON (WHO WAS IMPLEADED WITH JAMES ARNOLD AND OTHERS), APPELLANT.

Creditor's Bill—Fraudulent conveyance—Equitable relief.

Where, in a creditor's bill, filed to compel the application of choses in action, equitable interests, &c., to the payment of a judgment against A., it is charged that A. has made a fraudulent conveyance of a farm to H., and H. being made a party, it is claimed that the deed should be set aside, and it appeared that the conveyance was made in good faith, but that H. gave to A. a mortgage thereon which is unpaid, it is competent for the Court to decree that H. pay such mortgage to the receiver, to be applied on the judgment, although such mortgage was not named in the bill, nor in the prayer for relief.

In such cases, although it appeared that a third person, not a party to the suit, claimed to own the mortgage, and evidence tended to show an assignment by A. to him; still, it being proved and found that such assignment was fraudulent, it was proper to require H. to pay his mortgage to the receiver.

The objection that such third person should have been made a party, and that H. may hereafter be called upon to pay the mortgage to him, is waived by H. if he does not make it by answer or demurrer. And if, by reason of the omission of any notice of such mortgage in the bill, H. was left in ignorance that any claim to such mortgage would be made, and he was therefore surprised, he should have sought relief in the Court below, who would, no doubt, have allowed him to amend his answer.

APPEAL from judgment of the Supreme Court in General Term, in the Seventh District, affirming judgment entered on the report of a Referee.

The Plaintiffs are judgment creditors of James Arnold, by judgment docketed February 21, 1856, and, after the return of execution nulla bona, filed their complaint herein against the said James Arnold, and the Appellant, with others, alleging (so far as is material to this appeal) that, on or about the 20th February, 1855, the said James Arnold conveyed a certain farm therein described, to the Appellant, Hankerson, for the nominal consideration of $9,000, but that in fact noth-

Fraudulent conveyance—Pleading. 57 *Barb.* 148 *N.;* 46 *St. Rep.* 218 (19 *N. Y. Supp.* 638).

ing was paid therefor by Hankerson. That, at the time of such conveyance, Arnold was indebted to divers persons in large sums of money, and was greatly embarrassed; and the said conveyance was made for the purpose of hindering, delaying, and defrauding creditors; and that the farm is still held by Hankerson, for the purpose of covering and protecting the same as against the demands of the creditors of Arnold, including the claim of the Plaintiffs under these judgments.

The complaint also avers "that the said Arnold has property, equitable interest, debts and securities, and choses in action, which he owns or has some interest in, of the amount and value of more than one hundred dollars, &c., which the Plaintiffs have been wholly unable to reach by their execution aforesaid, and which ought to be applied to the payment of their said judgments."

The prayer of the complaint is, that Arnold be adjudged to to pay the judgments, and be decreed to apply for that purpose any money or property, real or personal, in law or equity, belonging to him or held in trust by him, or in which he had any interest; that Hankerson may be enjoined from conveying or encumbering the said real estate; that the conveyance to Hankerson may be adjudged fraudulent and void, and the title adjudged vested in Arnold, and the judgments declared liens thereon; and that a receiver of all the property of said Arnold be appointed, and that the receiver apply the avails of such property to the payment of such judgments and costs; and that the Plaintiffs have such further or other relief as shall be thought proper.

The Appellant, Hankerson, admits the execution and delivery of the deed to him by Arnold; denies that nothing was paid therefor; denies that it was executed to hinder, delay, or dafraud creditors of Arnold, or that the real estate is, or ever was, held by him for the purpose of covering or protecting the same against creditors of James Arnold.

The answer further denies all and every of the allegations

in the complaint, except the said execution and delivery of the deed to him.

The other Defendants did not answer.

The cause being referred and tried, the Referee found as facts: the recovery of the alleged judgments; the issue and return of executions unsatisfied; the conveyance to Hankerson on the 29th of February, 1855; that on the delivery of the deed, no payment in money was made by Hankerson, but that he gave his note to Arnold for $4000, and a bond and mortgage on the farm for $5,000, payable with interest, $1,000 a year, after five years from April 1, 1855; that, about May 1, 1855, Hankerson gave a new note for $2,200, and paid the balance of the $4,000 note, and has since paid the new note; that James Arnold, who had engaged in business in Detroit, failed in the fall of 1855, and was reported to have assigned his property to his brother, Hiram Arnold, who then resided and still resides in Michigan, and the said James has since been reported wholly insolvent; that, on the 12th November, 1856, (after his answer in this cause), Hankerson, with the knowledge of Hiram, and knowing James to be insolvent, paid James Arnold $1,350 to apply on the bond and mortgage, which at that time were at the house and in the possession of Hiram; and on the 20th December, 1859, Hankerson (by the funds of his wife) paid the further sum of $1,120 to James Arnold, to apply on the bond and mortgage, and took a receipt, therefor, signed "Hiram Arnold, for James Arnold."

He further finds, "That the purchase of said farm was bonâ fide on the part of said Hankerson; but the said mortgage so given has been kept in Michigan since about the time it was given, and has never been recorded, nor have any steps been taken to enforce the same against Hankerson; but the same has been held by said Arnold, or by Hiram Arnold for him, and under his direction and control, with the fraudulent intent to keep the same from his creditors; that there is now owing from Hankerson thereon, $4,784.48."

The Referee therefore concludes, "That the Plaintiffs are

entitled to the balance of the purchase-money unpaid by Hankerson on his bond and mortgage, or so much as will pay the judgments, and their costs herein; and that Hankerson be decreed to pay the same to a receiver, &c., with other provisions (declaring it a lien, &c., though not recorded); and that on payment by Hankerson the bond and mortgage be declared satisfied, and that James Arnold deliver it up to be cancelled; and that Hankerson be allowed his costs out of any funds in the hands of the receiver, before any money is applied to the judgments."

Other property was also declared liable to the judgments, and described to be sold and applied to the judgments; but no question is here made in regard thereto.

Injunction against payment by Hankerson to any one but the receiver, and against any proceeding by James Arnold against Hankerson, etc., for the collection of the bond and mortgage.

Hiram Arnold is not a party to this action.

From the judgment conforming to this report Hankerson appealed. The judgment was affirmed in General Term, and he therefore appealed to this Court.

D. Morris for Appellant.

E. G. Lapham and *H. O. Chesbro* for Respondents.

WOODRUFF, J.—The judgment herein is claimed to be erroneous upon two grounds: First, that every fact alleged in the complaint, which constituted any ground for making the Appellant Hankerson a Defendant, is untrue, and so found by the Referee, and all the relief which is asked in the complaint against the Appellant is denied. He should, therefore, have been dismissed with costs. Second, that no decree requiring him to pay the bond and mortgage to the receiver herein was proper: first, because there was nothing in the complaint to apprise him that the action was brought for any such purpose, or to put him to a denial of James Arnold's title thereto; and, second, because Hiram Arnold, the reputed assignee, who has

the possession of the bond and mortgage, and whose title thereto is found to have been recognized by James Arnold, is not a party to this action, and is not bound by this judgment.

1. The argument of the Appellant undoubtedly presents a case in which, good faith on his part being assumed, there is apparently possible hardship; for if Hiram Arnold were to prosecute an action against him upon the bond and mortgage in question, this judgment, and payment according to its requirement, would not per se protect him against a judgment in favor of Hiram, by which he might be compelled to pay it a second time.

But it is clear that this very concession is conclusive against the Appellant, on the claim that the decree was erroneous for want of parties.

By the express terms of the Code, a Defendant who neither by demurrer nor answer takes that objection waives it, and he cannot therefore be afterwards heard to object, *on that ground,* to any decree to which, upon the facts alleged and proved, the Plaintiff is entitled. As to *him,* the cause thereafter proceeds with the like right in the Plaintiff to a decree as if the supposed proper or necessary party were in Court. (Code, § 148.)

The only qualification of the right of the Plaintiff to a decree according to the case made by his complaint, and proved on the trial, where the Defendant has not, by his answer, raised the objection, is found in section 122 of the Code, which provides that where the controversy between the parties before the Court cannot be determined without prejudice to the rights of others, or by saving those rights, the Court must cause such others to be brought in.

Now, the Appellant's case presents this dilemma. If this judgment in anywise operates to the prejudice of Hiram Arnold, it can only do so by being deemed to conclude him; and if that were so it would protect the Appellant, and his objection would be groundless for that reason. But if, as must be conceded, this judgment would not operate at all to prevent the collection of the mortgage by Hiram Arnold, then this was not a

case in which it was the duty of the Court to cause him to be made a party.

This latter section of the Code (§ 122) was not intended for the protection of one who was made a party, however much he is liable to suffer from the abuse of some other party. He must protect *himself* by raising the objection in the manner prescribed by law. The Court, in ordering parties to be brought in, is only bound to look to their protection, and not to the protection of those who, having appeared, have waived the objection. In this the Court exercise an important power to protect absent parties against possible collusion or oversight by those who are before it.

Before the Code, it was held by the Chancellor that where a Defendant neglects to make the objection by plea, answer, or demurrer of the want of parties, who are only necessary for his protection from further litigation, the Court has a discretion, and may refuse to sustain the objection at the hearing, or to require the complaint to add new parties at that stage of the action (Dias *v.* Bouchand, 10 Page, 447.) The Code has now definitely enacted that such an objection shall be deemed waived.

The suggestion of the Appellant is plausible, that there was nothing in the Plaintiffs' compliant that was calculated to apprise him, or that did, in fact, inform him, that the Plaintiffs sought to charge him as debtor to James Arnold by bond and mortgage or otherwise. No fact stated in the complaint imported that he was such debtor, and no fact stated, nor relief prayed, indicated that the Plaintiffs had, or claimed to have, any right to, or equitable lien upon, the bond and mortgage; and therefore the necessity, or even the propriety, of making Hiram Arnold a party did not appear, and he had no reason to suppose it either necessary or proper. He could not, therefore, be deemed in any fault for not making the objection that a claimant of this bond and mortgage was not made a Defendant, when the compliant neither directly nor indirectly suggested to him that the title to the bond and mortgage was

called in question, or that he was chargeable as debtor of James Arnold by reason thereof. The only allegation addressed to him, or to his relations with James Arnold, the judgment debtor, or to his possible liability in favor of the Plaintiffs, was, that he was the grantee in a fraudulent conveyance of real estate, which was void, and the property will be taken to satisfy the judgments.

So far as this argument involves or suggests that, under the allegations in the complaint, it was erroneous to decree in favor of the Plaintiffs' payment out of a bond and mortgage that was not mentioned therein, or that the allegations in the complaint were not sufficient to warrant the relief which was awarded it, will be presently considered. But so far as it imports that Hiram Arnold ought to have been a party, and that the Defendant is wronged by a decree which he had no reason to anticipate, because the complaint did not appraise him that any question touching the bond and mortgage was involved in the action, the answer is, I think, this: First, as before suggested, the statute is absolute, that the objection that Hiram Arnold is not a party is to be deemed waived; second, the Code gives the Court ample power to relieve a party from the consequences of omissions which happen without fault, or through excusable neglect, and to permit the amendment of his pleading, if his case seems to require it. If, by reason of the generality of the allegations in the complaint, or its indefiniteness, the defendant was reasonably ignorant, as he now claims, and he had made the importance that Hiram Arnold should be made a party for his protection apparent, as he now does, in argument, I cannot doubt that so soon before judgment as the fact appeared, that this bond and mortgage was in fact the subject of claim by the Plaintiffs, the Court below would have permitted the Defendant to amend his answer, or file a supplemental answer and raise the objection. Indeed, it is not clear that the Defendant might not of right have interposed a supplemental answer in the nature of a cross-bill and interpleader, and so have brought in the said Hiram. (Code, §§ 172, 173, 174, and 177.)

2. On the allegations in the complaint, such as warranted the Court in decreeing payment of the judgments out of the bond and mortgage given by Appellant for part of the purchase-money of the farm, and charging the Appellant as debtor to James Arnold thereby, when it is not mentioned in the complaint at all, and there is not only no intimation in the complaint that such attempt is or will be made, but the contrary, since it is alleged that the conveyance itself was without consideration, fraudulent, and void; or in other words, the Defendant having denied or disproved all that is alleged against him, can he be charged as debtor of James Arnold, and be compelled to pay the debt for the benefit of the Plaintiffs?

Besides the allegations in the compliant, charging a fraudulent conveyance of the farm to the Appellant, and charging also another fraudulent conveyance to one Walker, the complaint states, that the judgment-debtor, James Arnold, has property, equitable interest, debts and securities, and choses in erty, equitable interest, debts and securities, and choses in action, which he owns, or has some interest in, of the amount and value, &c., &c., which the Plaintiffs have been wholly unable to reach by their execution aforesaid, and which ought to be applied to the payment of their said judgments.

When actions to obtain a discovery under oath by judgment debtors, and payment of the judgment debt, were the common mode of proceeding after execution returned unsatisfied, these allegations would have been the proper ground for interrogatories, and for proof of any outstanding indebtedness to the judgment debtor, and the basis upon which, when discovered or proved, the Court might appoint a receiver, and compel the delivery to him of the security, voucher, or evidence of indebtedness. And if the debt was due from one of the parties to the suit, I see no reason why the Court should not, as was done in this case, degree payment by him to the receiver. The object of such a bill was not merely discovery, but payment. To that the discovery was only auxiliary.

The present complaint is of the same character. It has re-

sulted in proof of the allegation above cited, viz., that James Arnold has a bond and mortgage, and that the Appellant owes to him thereon $4,784.48. Why should not the decree direct the payment thereof to the receiver?

If it be said that the Appellant has had no fair opportunity to deny his indebtedness, or the title of the debtor, James Arnold, the answer is, the Appellant, by putting in issue the above recited allegations, did not deny it, and every fact bearing upon that subject which the Plaintiffs proved, or attempted to prove, the Defendant was in a situation to contradict and disprove, if it was not true.

And if the suggestion be again made, that this claim of the Plaintiffs to a matter not mentioned specifically in the complaint was a surprise, that the Defendant was not and could not be prepared to meet such a claim on the trial, the answer is, the Court below have power in their discretion to relieve and protect a party against surprise, of justice and equity require it. But the legal right to proceed to try all that is involved in an issue, however general, and to make such decree as the facts will warrant, is clear.

It is suggested that those allegations in the complaint which in terms affect the Appellant were allegations of fraud in the conveyance to him, being found untrue by the Referee, may be wholly disregarded, and the complaint must therefore be treated, for the purpose of this appeal, as if they were not in it. And if they be struck out, the complaint is demurrable by the Appellant; it shows no cause of action against him. The allegations may amount to a cause of action against James Arnold, the judgment debtor, but (apart from the charges of fraud) they do not show that the Appellant has any interest in James Arnold's assets, or that he himself holds any of James Arnold's property, or owes James Arnold anything. And, therefore, if he had admitted those allegations in terms, or by not answering, they would not have shown any liability on his part.

It is undoubtedly true that if, in the prosecution of a creditor's bill, choses in action are discovered, the usual decree

awards those choses in action to a receiver to be collected. When he attempts to collect, the supposed debtor has full opportunity not only to deny his indebtedness, but to allege and prove that some other person, and not the judgment debtor, is the real creditor entitled to the security and to payment.

The question presented by the objection last stated is simply this: where such supposed debtor is in fact (whether made so upon grounds which proved true or false) a party to the creditor's bill, may not the Court give entire relief against him in that suit, instead of leaving the receiver to prosecute another?

In supplementary proceedings a third party may be examined (§ 294), and the Judge may order the debt due by such person to the judgment debtor to be paid on the judgment (§ 297), or may appoint a receiver in his discretion. But if the third person deny the indebtedness, it can only be recovered in an action against him by the receiver (§ 299).

Now if this were the rule, where an action is actually brought by the judgment creditor, it would follow, where the supposed debtor was in express terms so charged in the complaint, and denied it in the answer, that the Court could not try the question, but must leave it to an action by the receiver.

This is not so; and the whole objection, I think, founded in the idea that a Defendant may, for want of a sufficient specification of the claim made against him, be surprised into a condition of admitting the general allegation, that the judgment debtor has choses in action, debts due to him, &c., or of coming to trial without being prepared to disprove it, and so may himself be wrongfully charged as himself debtor, must be disposed of by the observation, that the Courts of original jurisdiction have ample power and discretion to protect a party from injustice, if applied to in due season and in proper form.

I think the judgment must be affirmed.

Judgment affrmed.

JOEL TIFFANY,
State Reporter.

JOHN CRAIG, RESPONDENT, *v.* THE ROCHESTER CITY AND BRIGHTON RAILROAD COMPANY, APPELLANT.

Ownership of lands bounded on highway—Railroad tracks—Additional burden—Constitutional prohibition.

The construction of a railroad along a street or avenue in a city imposes an additional burden upon the property-holders bounded by the centre of said street or avenue, within the meaning of the constitutional provision which forbids such taking without compensation.

THIS is an appeal from a judgment of the General Term of the Supreme Court of the Seventh District, perpetually enjoining the Defendant from laying its tracks (a horse-railroad

Streets—Use by street railways—Abutting owners. 46 *N. Y.* 49; 50 *N. Y.* 210; 62 *N. Y.* 389; 78 *N. Y.* 427; 90 *N. Y.* 188; 121 *N. Y.* 515 (31 *St. Rep.* 828); 128 *N. Y.* 163 (40 *St. Rep.* 392); 170 *N. Y.* 303, 305; *D.* 170 *N. Y.* 309; *D.* 86 *Hun,* 431 (67 *St. Rep.* 626; 33 *N. Y. Supp.* 897); 10 *App. Div.* 355 (41 *N. Y. Supp.* 1109); 65 *App. Div.* 539 (72 *N. Y. Supp.* 1000); 67 *App. Div.* 360 (73 *N. Y. Supp.* 795); 72 *App. Div.* 296 (76 *N. Y. Supp.* 71); 72 *App. Div.* 405 (76 *N. Y. Supp.* 590). 5 *Misc.* 61 (25 *N. Y. Supp.* 115); 46 *How. Pr.* 399; 3 *Abb. N. C.* 345; 10 *Abb. N. C.* 115; 15 *Abb. N. S.* 125; 1 *Sheld.* 454; 50 *Super.* 325; 15 *Daly,* 165 (22 *St. Rep.* 246; 4 *N. Y. Supp.* 388); 18 *N. Y. Supp.* 251.

Highways—Obstructions in—Rights of abutters. 143 *N. Y.* 140 (62 *St. Rep.* 142); 67 *Hun,* 161 (51 *St. Rep.* 525; 22 *N. Y. Supp.* 325); 11 *App. Div.* 216 (42 *N. Y. Supp.* 953); 6 *App. Div.* 17 (39 *N. Y. Supp.* 526); *D.* 49 *App. Div.* 445 (63 *N. Y. Supp.* 488); 1 *Abb. N. C.* 72.

Railroads—Construction in Highway—Rights of abutters. 38 *Hun,* 497; 54 *Hun,* 195 (26 *St. Rep.* 909; 7 *N. Y. Supp.* 439); 57 *Hun,* 60 (32 *St. Rep.* 1; 10 *N. Y. Supp.* 379); 3 *Abb. N. C.* 314; 15 *Abb. N. C.* 54; 2 *Lans.* 296; 39 *St. Rep.* 272 (15 *N. Y. Supp.* 775); 18 *St. Rep.* 907 (2 *N. Y. Supp.* 563).

track) in East Avenue, a public street of the city of Rochester, opposite the premises of the Plaintiff, or doing anything in relation thereto. The facts of the case are as follows:

The Defendant was organized and by virtue of the general railroad act, on the 20th day of May, 1862. On the 24th day of June, 1862, the Defendant procured the consent of the Common Council of the city of Rochester to its constructing, maintaining, and operating its road and laying its track through sundry streets of that city, upon certain terms, conditions, and stipulations.

By the terms of such consent, such railroad track was to be constructed of the improved Philadelphia broad rail, six inches face, half-inch raised edge, the edge to be laid flush with the surface of the street, four feet ten inches apart between the raised edges, so as to accommodate the most common width of carriage wheels. The track was to be so laid as to permit the free passage of vehicles over the same, and the rails laid even with the surface of the street, and to conform to the grades thereof as they were then established, or should thereafter be established or altered. Provision was made for the keeping open of the streets, &c., during the laying of the track. The cars to be used on the railroad were to be drawn by horses or mules only, at a speed not exceeding seven miles per hour, and to be run as the Common Council should prescribe. Numerous other provisions as to the operation of the road were attached to the consent of the Common Council.

Under this consent, which was accepted by the company, the Defendant was proceeding to construct its road, when the Plaintiff, on the 21st of October, 1862, commenced his action against the Defendant, in which he alleged that he was the owner of a lot on East avenue, extending to the center of said street, upon which was situated his dwelling-house; that the Defendant was a corporation, organized under the railroad act, and was about to commence the construction of its road in said East Avenue, running along the center of said street past his said premises; that the Defend-

ant had taken no proceedings to acquire the title of the Plaintiff to any part of the premises, or to assess his damages, and that the Defendant claimed to construct its road in East avenue without obtaining his consent, or taking proceedings to acquire title; that the construction of said road, and said road after its completion, would, in his judgment, greatly impair his enjoyment of his said premises, and depreciate the value thereof.

The Defendant, in its answer, admitted the title of the Plaintiff to the premises in question, and that it was about to construct its railroad through East Avenue, but denied that it would impair or depreciate the value of the Plaintiff's premises. The answer then set forth the consent of the Common Council of the city of Rochester, before referred to, and that its road was to be constructed and operated in accordance with the provisions thereof.

The action came on for trial before Justice J. C. Smith, when the Plaintiff read the pleadings and rested his case. The Defendant put in evidence its articles of association, the map and profile of its route, the consent of the Common Council before referred to, its acceptance and adoption thereof, with the approval of the attorney of the city, as required thereby. Upon this testimony the case was submitted to the Court.

The Court, on the 2d of April, 1863, made its decision. The findings of the Court contain substantially the facts above stated, that the Defendant formally accepted the consent of the said Common Council, subject to the conditions, provisions, and restrictions therein contained, and bound itself to keep and observe the same, under which it claims to construct its road, and not otherwise.

The Court decided that the construction by the Defendant of the railroad authorized and permitted by the resolution aforesaid (the consent of the Common Council) in the aforesaid street opposite the premises of the Plaintiff would be the imposition of an additional burden upon, and the taking of, the property of the Plaintiff, within the meaning of the constitutional provision, which forbids such taking without com-

pensation, and that the Defendant derived no authority to do the acts aforesaid by the acts of the Legislature under which it is incorporated, or said resolution of the Common Council of said city, without the consent of the owners of the fee, or the appraisal and payment of his damages in the mode provided by law, and granted a perpetual injunction.

This judgment was afterward affirmed on appeal by the General Term of the Seventh Judicial District, from which decision this appeal is taken.

W. F. Cogswell for Appellant.
T. R. Strong for Respondent.

MILLER, J.—The Defendant in this action claims the right to construct a horse-railroad through the streets of the city of Rochester, by virtue of the consent of the Common Council of said city, without making any compensation for damages to the owners of lots along the street in which the road passes. The claim thus urged is based upon the ground, that the building of such a railroad is not an infringement upon the rights, or an injury to the interests, of the owners of the land adjoining, and that it is only a mode of exercising the public right of passage, with which they have parted; and not such an additional or further appropriation as entitles them to pecuniary remuneration.

I am inclined to think that the question involved in this case has been substantially adjudicated by this Court in several cases, and that the principle has been definitely settled, that such a use of the land imposes an additional burden upon the owner of the fee of the lands adjoining. Such is, no doubt, the rule as to railroads operated by steam power.

In the old Supreme Court, in the case of The Trustees of the Presbyterian Society in Waterloo v. The Aub. & Roch. R. R. Co. (3 Hill, 567), the doctrine was laid down, that the laying out of a highway gives the public a mere right of passage with the powers and privileges incident to such right; that the owner of the soil is not thereby divested of his title

to the land, and that a railroad company was bound to make compensation for constructing its road across the highway. (See also, Fletcher v. The Auburn & Syracuse R. R. Co., 25 Wend. 462.) The same principle was again more distinctly asserted in Williams v. N. Y. C. R. R. Co. (16 N. Y. 97), and it was held that an appropriation of a highway by a railroad company is the imposition of an additional burden upon, and the taking of the property of the owner of the fee, within the meaning of the constitutional provision, which forbids such taking without compensation, and that the company can derive no title by an act of the Legislature, or of any municipal authority, without the consent of the owner of the fee, or without the appraisal and payment of damages, in the mode prescribed by law.

In the case last cited, an action was brought to recover damages for running cars upon the railroad, and to restrain the Defendant from enlarging upon and running over a was made on that part of the road which is three rods in width, public street in the city of Syracuse in front of the Plaintiff's premises, and it presented the distinct question, whether the dedication of land to the use of the public as a highway precludes the owner of the fee, subject to the easement, from maintaining an action against a railroad company, which without any consent, or the appraisal of damages, enters upon and occupies such highway with the track of the road; and it was decided that the action was maintainable.

The same principle here asserted has also been upheld by other adjudications of this Court. In Davis v. The Mayor of New York (14 N. Y. 506), which preceded the case of Williams v. N. Y. C. R. R. Co., the reasoning of the learned Judge who delivered the opinion sustains the same views which were enunciated in the latter case. The same doctrine is also upheld by several reported cases, since decided by this Court. (See Mahon v. The N. Y. C. R. R. Co., 24 N. Y. 658; Carpenter v. The Oswego & Syracuse R. R. Co., id. 655; Wager v. The Troy Union R. R. Co., 25 id. 526.)

These cases must be considered as settling the question be-

yond peradventure, and conclusively, that the occupation and use of a street by a railroad company, operated by steam, and in the ordinary manner in which such roads are constructed and carried on, is an appropriation of the highway for a new and distinct purpose, entirely foreign from its original object, and which entitles the owner to compensation. The position cannot be controverted. An attempted distinction is, however, sought to be made between railroads operated by steam, and those which are simply used by horses as a motive power, in the streets of populous cities; and it is contended that the rule laid down is entirely inapplicable to the latter class of railroads, which of late years have come into use, and which are increasing in numbers as the wants and necessities of large and populous communities demand more expeditous and more extended means for the transportation of passengers between the widely separated and distant portions of such communities.

The position thus taken is not entirely without authority to uphold it, and our attention has been called to several cases decided in the Supreme Court of this State, as well as to some decisions of the Courts in other States, which sustains the doctrine contended for by the Defendant's counsel. In another connection I shall have occasion to refer to the cases relied upon by the Defendant's counsel, and without examining them in the present stage of the discussion, will proceed to consider how far the cases decided by this Court affect the question now present.

The effect of the decisions which I have cited is fully considered in the able opinions of the General Term delivered upon the decision of the case now considered, and the principle enunciated by them was there held to be applicable to street railroads, equally with those where steam is employed as the motive power.

Without discussing them at length, I shall deem it sufficient to refer briefly to the case of Wager v. The Troy Union R. R. Co. (supra), which had been but recently decided and was not reported when this case was decided at General Term. In that case the former decisions are indorsed

and reaffirmed, and the learned Judge who wrote the opinion refers to the distinction claimed to exist between railroads operated by steam and horse power in the following explicit terms: "With a single track, and particularly if the cars used upon it were propelled by horse power, the interruption of the public easement in the street might be very trifling, and of no particular consequence to the public at large. But this consideration cannot affect the question of right of property, or of the increase of burden upon the soil. It would present simply a question of *degree* in respect to the enlargement of the easement, and would not affect the principle, that the use of a street for the purpose of a railroad, imposed upon it, is a new burden."

If these views can be considered as embodying the opinion of the Court in the case last cited, then they are entirely decisive of the question presented, and must be considered as controlling, and render any further inquiry entirely needless. But, as the distinct point which we are now considering was not presented, it may be well to look at the question, upon principle, in the light of the decisions applicable to railroads propelled by steam, to which I have adverted.

The ground upon which these cases are decided is, that the use of the land for a railroad imposes an additional burden upon the owner of the fee. I am at a loss to see any apparent distinction in the application of the rule between cases where steam power is employed and those cases where the road is operated by horse power. It is true there is some difference in the manner in which the road is constructed, and in the speed with which the cars are propelled, at times; but there is precisely the same exclusive appropriation of the track for the purposes intended in each case, to the absolute exclusion of all who may interfere with its mode of operation. The power to use the road for the conveyance of passengers is entirely with the company, and no person can interfere with that method of conveyance, or with the right of the company to enjoy its monopoly.

As was held in Hegan *v.* The Eighth Avenue R. R. Co.

(15 N. Y. 380), the company has the exclusive right of the track while cars are passing, and all others must keep out of their way, and if a party is injured while they are proceeding at a reasonable and lawful speed an action cannot be maintained against the company for the injury. This privilege of laying and using the track in such a manner confers upon the company a right to the use and enjoyment of the track which precludes other vehicles while the operations of the company in the use of the track demand their exclusion. Such a right is, I think, inconsistent with the nature of the easement acquired by the public. In Williams v. The N. Y. C. R. R. C., Selden J., after stating the distinction between the two uses to which the highway is applied by converting it into a railroad track, proceeds to argue, that by means thereof two easements are created, one vested in the public, which has been paid for, and the other in the company, and remarks: "These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that it is carved out and is a part of the public easement, and is therefore the gift of the public. This would do if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted?" There is much force, I think, in these suggestions, and it is difficult to see how they can be answered satisfactorily and according to any well-settled legal principle. If the reasoning of the learned Judge is correct, then the same rule is applicable to each class of railroads, the difference in the use being only in the degree. (25 N. Y. 533.)

The use of a railroad, no matter how it is operated, whether by horse or steam power, necessarily includes, to a certain extent, an exclusive occupation of a portion of the highway for the track of the road, and the running of its cars by the company, and a permanent occupation of the soil. It requires that all parties shall stand aside, and make way for its progress. This is clearly inconsistent with the legal object and de-

sign of a highway, which is entirely open and free to all, for the purpose of locomotive travel and transportation. The enjoyment of the easement in a highway never confers an exclusive right upon any one who may have occasion to use it, while the laying down of rails, and the employment of cars, is to the detriment and exclusion of all others at the time when the cars are running, and a restraint upon a free, undisturbed, and general public use. It is an assertion of a right to the pessession of the highway by the corporation, and an appropriation of it to private occupation, which, by lapse of time, might ripen into a right, and vest a title in the company.

Instead of being the exercise of a right of passage and repassage over a highway or a street, it cannot, I think, be denied, that it is sometimes an obstruction to travel, and an infringement upon the rights of the public and owners of land. In narrow streets, where the rails of the road border close upon the sidewalk, it not only interposes obstacles to the traveler, but inflicts injury upon the lot owner, by blocking up the way, and preventing a free access to the premises. The large and unwieldy vehicles which are used, which can only proceed upon a track laid for that purpose, with no capacity to turn out, so as to avoid or accommodate ordinary carriages, are often a source of annoyance and obstruction to the free passage of horses and carriages, for periods of greater or less duration, and are inconsistent with the use of an open and free passage of the highway.

I have examined the decisions of the Supreme Court of this State, which have been cited in support of the Defendant's theory. (33 Barb. 420; 35 id. 304; id. 373; 37 id. 35.) In none of them was the distinct question now considered presented and adjudicated, although some of the opinions maintain the distinction now asserted as existing between the two classes of railways. The cases referred to are also examined and criticised in the opinion of the General Term in this case, upon the appeal from the order denying the motion to vacate the injunction (39 Barb. 494), and I do not deem it necessary to discuss the points of difference more at length. If, under

any circumstances, either of them can be considered as deciding the question now before us, then, I think, they are in conflict with the decisions of this Court, as well as sound principles, and must be disregarded.

In The People *v.* Kerr, one of the cases cited, which was subsequently carried to the Court of Appeals, and is reported in 27 N. Y. 188, the decision was put upon the ground that the fee of the street, as against the Plaintiffs, was held by the corporation of New York City, and that the plaintiffs, other than the people, had no property in the land forming the bed of the street in front of their respective premises, to be protected by the constitutional limitation upon the right of eminent domain.

The decisions of the Courts of other States, to which our attention has been directed, even if applicable, can have no weight in overthrowing the adjudications of our own Courts, and do not, therefore, require examination.

The principle decided in Benedict v. Goit (3 Barb. 459; and approved in 14 N. Y. 516), that a highway does not cease to be such, for general purposes, by being converted into a turnpike or plank-road, which has been invoked, does not aid the Defendant. In the latter case, the general right of the public to use the road remains unimpaired. The change effected is, that the general public, in consideration of the payment of certain tolls, is relieved from the burden of keeping it in repair. Every citizen has the same right to travel over the turnpike or plank-road in his own conveyance, and the material used in making the latter is a mere improvement of the road, for the benefit of the whole public, without a special appropriation of any part or portion to the use of a particular class of carriages owned by the company, to the exclusion of others who may desire to use that portion at the same time, and, as must be conceded, at times to the obstruction and hindrance of persons who may be traveling, if not to those whose lands are located on the line of the road.

The considerations suggested cover all the points urged

which are material in the disposition of this case, and inevitably lead to affirmance of the judgment of the Supreme Court.

Judgment affirmed, with costs.

JOEL TIFFANY,
State Reporter.

WILLIAM P. ANGEL, RESPONDENT, *v.* HARRIET HOLLISTER, EXECUTRIX, &C., OF LEVI COON, DECEASED, APPELLANT.

Replevin—Res adjudicata—Former recovery for portion of goods—Evidence—Title.

Where a Plaintiff in replevin took several chattels from the possession of the Defendant, and recovered final judgment for a part of them only, on a trial on which the title to the whole was contested, he cannot, on the trial of a subsequent replevin, brought to regain the possession of the residue of the chattels by him from whose possession they had been so taken, be permitted to allege title and prove it by the "same evidence by which he had endeavored to prove title to the same property" on the former title, and failed.

The effect of a verdict in replevin against the Plaintiff, where the Defendant by his answer merely puts in issue the allegations of the complaint, is not necessarily conclusive that the Plaintiff has no title to the property; it may have been found that the Defendant did not wrongfully detain. Its effect, therefore, depends upon extrinsic evidence.

But where the property was taken from the Defendant's possession, and it is proved that title to property was in fact the subject of the contest on that former trial, the verdict therein for the Defendant is conclusive.

APPEAL from judgment of General Term of Eighth District, reversing judgment entered on the report of a Referee dismissing the complaint.

This action is brought to recover the value of 18,000 shingles, and 4,000 feet of hemlock boards, joists, and scant-

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Replevin—Possession—Judgment for. 8 *Misc.* 609 (61 *St. Rep.* 54; 29 *N. Y. Supp.* 394); 43 *Misc.* 367 (87 *N. Y. Supp.* 495); 10 *Daly,* 175.

Judgment—Res adjudicata—Evidence dehors the record. 8 *Hun,* 402; 21 *Hun,* 149; 37 *Hun,* 598; 62 *Hun,* 550 (42 *St. Rep.* 422; 17 *N. Y. Supp.* 42).

ling, and 400 lineal feet of sawed timber, framed, ready to be put into a building alleged to be the property of one Mallory, and taken and sold by the Defendant. The Defendant put in an answer to the complaint denying each and every allegation therein contained. On the trial of the action it appeared that in August, 1856, Levi Coon, the Defendant's testator, commenced an action against Mallory, to recover from him the possession of the shingles and lumber in question, together with a quantity of framed timber.

That cause was tried before a Referee, who, after hearing the proofs of the parties, found that the Plaintiff was entitled to recover the possession of that portion of the property described in the complaint, which was therein described as "framed timber," and which timber so described had been delivered to the Plaintiff during the pendency of the action, on which report judgment was entered for the Plaintiff for the possession thereof, with costs. It appears that the Referee in that case made no formal or written determination as to the rights of the parties as to the residue of the property described in the complaint in that action.

It was proved, in this action, that the property described in the complaint therein was the same property in the complaint in the original action, not referred to in the Referee's report. That, at the commencement of said action of replevin, said property was taken from the possession of said Mallory, and delivered to said Coon, by the sheriff. That Coon afterward, and in August, 1856, sold the same to one Weiss, and it was used in the erection of a building by him, and that it was then worth $75. And, before the commencement of this action, Mallory assigned his claim to the Plaintiff.

The Plaintiff rested, and the Defendant offered to prove title to the property in question in Coon, at the time of the alleged conversion, by legal purchase on execution upon a judgment against one Young, and admitted that, on the trial of the former action against Mallory, Coon introduced the same evidence to establish his title to the property now in litigation, together with the rest of the property thence replevied. This

evidence was objected to, among other things, for the reason that the record which had been given in evidence in Coon v. Mallory concluded the Defendant, and barred her showing title in such property in Coon; that such title had been once litigated and decided against him. The Referee overruled the objection and admitted the evidence, and the Plaintiff duly excepted; a judgment was entered upon the Referee's report, and the Plaintiff appealed to the General Term, where the judgment was reversed. Judgment was entered, and the Defendant appealed to this Court.

Jerome Rowe for Appellant.
William A. Meloy for Respondent.

MILLER, J.—The decision of this case depends upon the correctness of the Referee's ruling in admitting proof of title to the property in question in Coon. I think that he committed an error in his decision, and that the Defendant was barred by the record, in the action brought by Coon *v.* Mallory, from showing such title, because it had been disposed of by the decision and judgment in that case.

In the action of replevin brought by Coon *v.* Mallory, the complaint alleged that the Defendant became possessed of, and wrongfully detained, the property claimed; and the answer denied each and every allegation, without making any claim for a return of the property.

The Code (§ 277) provides that where the property has been delivered to the Plaintiff, and the Defendant claims a return thereof, judgment may be rendered for a return of the property or the value thereof, in case a return cannot be had, and damages for the taking and withholding of the same. This provision altered the Revised Statutes, which gave the Defendant the right to elect either or take judgment for the return, or for the value of the property, at his option. (2 R. S. 531.) As it does not appear that any claim was made by the Defendant for a return of the property, he was not entitled to a judgment to that effect.

It is insisted by the Defendant's counsel, that the denial

in the answer put in issue the title to the property, and, in determining that question, the Referee could only decide the whole issue by finding the fact of the Defendant's title, and by rendering a judgment for its restoration.

I think this position is not a sound one, and it is in direct conflict with Yates *v.* Fassett (5 Denio, 21). The case cited was an action of trover to recover the value of a canal-boat which had been replevied by the Defendant of the Plaintiff and another party in a previous action, and a judgment rendered in favor of the Defendant for costs, in which action the title was litigated. It was held that the Plaintiff could recover, and where a party, sued for replevin in the detinet, pleaded only non detinet, and had a verdict in his favor, and a judgment for costs, but not a return that he could maintain an action against the Plaintiff in the first suit, although he might have so pleaded as to entitle him to a return of the value of the property, and had omitted to do so. The whole subject is fully discussed and elaborately considered, and the learned Judge who wrote the opinion says: "I see no reason why a Defendant in replevin may not confine himself simply to his defence on non detinet, withholding any special plea of title to the property, and, in case the verdict is against the Plaintiff, present a claim of title in another suit." This, I think, covers fully the question here presented, and must be controlling in this case.

We have been referred to several other cases which, it is claimed, are in conflict with these views. In Pierce v. Van Dyke (6 Hill, 613), it was decided that a Defendant in a replevin suit, who succeeds at the trial under a plea of non detinet, on the sole ground that the property should have been demanded before suit brought, is not entitled to judgment for a return, or for the value of the property, and that, in order to entitle him to judgment for a return, under the plea of non detinet, he must succeed on the two branches of the issue upon that plea, the detention of the property of the Plaintiff in the goods. And, even then, it is said merely that it may be that the Defendant should have a return, although the statute mili-

tates against that conclusion. Without deciding the precise question, it in no way interferes with the principle decided in the late case of Yates v. Fassett.

In McKnight v. Dunlop (4 Barb. 36), it was held that a Defendant in a plea of non-detinet in replevin will be entitled to a return, where the jury find that the Plaintiff has no property in the goods replevied; and it was said that whenever a Defendant in a replevin is entitled, under the pleadings, to try the title to the property, and, in case he succeeds, is entitled, under such pleadings, to a return of the goods, he is bound to try the title in such suit, and to take judgment therein for a return, or the value of the goods. No allusion is made to the case of Yates v. Fassett; and the learned Judge, in his opinion, refers to Pierce v. Van Dyke, as intimating that a Defendant, in a plea of non detinet, will be entitled to a return where the jury find that the Plaintiff has no property in the goods. I have already stated what the intention was, and it is manifest that so far as it may be in conflict with the latter case, it cannot be considered as a binding authority. As the Defendant in the replevin suit did not claim a delivery of the property belonging to him, he would not be entitled, under the pleadings, to a return of the property, and hence the rule laid down has no application in the case before us. But if the answer of the Defendant in the replevin suit can be considered as equivalent to a plea of non detinet, and the cases referred to and relied upon by the Defendant establish that such a plea requires the Defendant to obtain a verdict and judgment for a return of the property, then they are in conflict with Yates v. Fassett, which has never been directly considered and overruled, and which, I think, should stand as the better exposition and elucidation of the principle involved, and as a well-considered and sound decision of the question.

In the replevin suit, the Defendant had possession of the property, was primâ facie the owner, and Coon was bound to establish title in himself as against the Defendant in that action before he could recover. It will be seen that this involved the whole question of title, whether Mallory was lawfully in

possession, and Coon had a title as against the possession. Proof of Mallory's title was not demanded, as he would have a right to establish title in a third party, and, being in possession, Coon's title was the essential issue litigated. In failing to obtain a judgment in his favor, the title of Coon was judicially determined against him, and the question must be considered as res adjudicata. The Referee clearly erred in admitting the testimony objected to.

The point taken, that the Plaintiff's remedy is on the bond, and that it becomes substituted for the goods, cannot, I think, be sustained; as no judgment had been given for a return of the property, in accordance with the condition of the undertaking, there was no forfeiture, and no recovery could be had.

As these considerations dispose of the case, it is not necessary to discuss some other points made on the trial. The judgment of the General Term, reversing the judgment entered on the Referee's report, must be affirmed, and judgment absolute entered in favor of the Plaintiff.

WOODRUFF, J.—The intestate, by proceedings in replevin, took from the possession of the assignor of the Plaintiff the property now in question. By that action he invited an issue upon his title to the property, and his right to retain that possession which he had by those proceedings obtained.

The assignor of the Plaintiff, Defendant in that action, put in issue that title and that right of possession and also the averment that he wrongfully detained the property.

On the trial, although the then Plaintiff established his right as to the property included in the replevin, he wholly failed as to the property now in question. It is clear, therefore, that had the former replevin embraced no other property than that now sued for, judgment must have been rendered for the Defendant therein for his costs. According to the decision of the Supreme Court in Yates v. Fassett (5 Denio, 21), he could not, in that event, have had any other judgment. Not having pleaded title or right of possession in himself or in

another, he could not have had judgment for the return of the property. So here, as he had not pleaded title, he could not, according to the intimation in that case, have had judgment for the return of the property now in question; and, under the Code, it is where the Defendant by his answer claims a return of the property that such a judgment can be given. If this be correct, then the judgment in the former action is conclusive upon the Plaintiff therein (this Defendant's intestate) as to one, at least, of the facts which, in respect of the property now in question, constituted a defense admissable under those pleadings; to wit, either that the Plaintiff had no title to the property, or that the Defendant did not wrongfully detain it. The mere failure of the then Plaintiff to recover in that action for this property—and that is all that the judgment record discloses—would not determine upon which of these grounds the judgment was rendered.

It is obvious that a judgment in replevin, founded on a verdict finding simply and only that the Defendant did not wrongfully detain the property described in the compliant, would not establish that the Defendant owned the property, or that the Plaintiff did not. On the other hand, a verdict that the Plaintiff had no title, and judgment thereon, would be conclusive upon such Plaintiff in any subsequent action in which it was attempted to be shown that he had title.

The effect of a judgment for the Defendant in such a replevin suit, when his answer is a mere denial of the Plaintiff's allegations, must therefore depend upon extrinsic evidence. If, in that suit, the property was taken from the Defendant's possession, and was delivered to the Plaintiff, and the question actually tried was whether the Plaintiff had title, then a verdict for the Defendant is conclusive against the Plaintiff that he had no title, and he cannot be afterward heard, in an action with the same party, to impeach that verdict.

Now, on the trial of the present action the Plaintiff proved such a judgment on a finding of a Referee, in substance that the intestate (then Plaintiff) had failed to prove allegations in his complaint in respect of the property now in question.

The Plaintiff then proved that the property was in possession of Mallory (then Defendant), and that the then Plaintiff (Coon) took the property from him by the process.

The Defendant then offered to prove title in himself by "the same evidence" by which he had endeavored "to establish his title to the property now in litigation," on the former trial between the same parties, in which he had recovered other property embraced in that suit.

I think this evidence was clearly inadmissable; it was a plain endeavor to litigate a question which was in issue between the same parties on the former trial,—a question upon which the Plaintiff then (now Defendant) had the burden of proof, and which was in fact litigated, and in which he failed. Upon elemenetary principles, applicable to all verdicts, the Plaintiff in that action was concluded.

It is said, however, that inasmuch as the Defendant in the former action (the Plaintiff's assignor) might have set up his title in the former action, and had a judgment for the return, and did not do so, he also is barred, and cannot maintain this action to recover the possession.

I concur fully in the decision in Yates *v.* Fassett (5 Denio, 21), that no such consequences result from the failure of the Defendant to obtain such judgment. He was put upon his defence, and, if he defended himself against the claim to this property, he might have entitled himself to a judgment affirmative in its character that this property be returned to him, but he was not bound to do so. Possibly, upon the then state of the pleadings (according to Yates *v.* Fassett), he could not, by any proof, have entitled himself to such a judgment. At all events the question of *his title* to this property was not decided against him. It may be conceded that a Defendant, though he succeeded in defending himself, does not always, whatever may be his pleadings, entitle himself to a judgment for a return,—e. g., where the Plaintiff proves title and right of possession, but the Defendant shows that his possession was originally without wrong, and defeats the ac-

tion, because there was no demand before suit brought. (Pierce *v.* Van Dyke, 6 Hill, 613.)

But the fact that he has no affirmative judgment for a return does not per se show that he is not entitled to the possession. The illustration given in Yates *v.* Fassett is apt and conclusive. A defendant in an action may, in a proper case, recoup his damages, and may obtain his affirmative judgment; but the fact that he omits to recoup does not bar his cross-action.

I think the order granting a new trial should be affirmed, and, pursuant to the Defendant's stipulation, judgment absolute should be entered for the Plaintiff, with costs.

GROVER, HUNT, and CLERKE, JJ., not voting.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

AARON BISSELL, APPELLANT *v.* CHARLES BALCOM, RESPONDENT.

Statute of Frauds—Part delivery—Payment on account.

Where the Plaintiff and Defendant made a verbal agreement for the sale of cattle, at a price exceeding fifty dollars, without any actual delivery or payment of any part of the price, but the next day the Plaintiff called on the Defendant for a payment to bind "the bargain, so that there will be no chance to back out," and for that purpose the Defendant makes a payment of part of the price, the contract is valid and binding, within the Statute of Frauds of this State.

The requirement that the buyer shall, *at the time,* pay some part of the purchase-money, in our Statute is satisfied. In such case, the sale will be deemed made when the money was paid; for then the minds of the parties meet in the fact of sale, and a mutual intent is expressed to make it then valid and binding, according to the tenor of the previous oral treaty. Where a present absolute sale of cattle is verbally made, without actual delivery of the cattle to the buyer, but the seller agreed that the cattle may remain on his land, and be taken from time to time by the buyer, as he wants them to butcher, and the buyer gives directions to the seller to remove the cat-

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Void contract—Making valid—Payment on account. 45 *N. Y.* 150; 53 *N. Y.* 120; 57 *N. Y.* 379; 84 *N. Y.* 554; 20 *Hun,* 418; 5 *Lans.* 182.

tle to another field for pasture, and he does so, and afterwards the buyer directs another removal, which is also complied with by the seller:

Query 1st. Is not this a sufficient delivery and acceptance of the cattle to satisfy the requirements of the Statute of Frauds? 2d. Is not the possession thereby in judgment of law changed, the seller holding the cattle thereafter not as owner, but as the agent and bailee of the buyer?

APPEAL from order of the Supreme Court in General Term, in the Seventh District, setting aside a verdict and awarding a new trial.

The action is brought to recover the price of fifteen head of cattle, alleged to have been sold and delivered by the Plaintiff to the Defendant, on the 29th of August, 1861.

The answer put in issue every material allegation in the complaint, and allege that at the time of the alleged sale the Plaintiff was to feed, pasture, and take good care of the cattle, and deliver them to the Defendant on or before the first of December, 1861, and that he did not take such care, but by his negligence several of the cattle were lost and drowned, to the damage of the Defendant, &c., which he will recoup, &c.

The Plaintiff testified, among other things: "I sold the Defendant, in the fall of 1861, fifteen head of two-year-old cattle; fourteen of them were steers; he was to pay me for them $290. He paid me $5 to apply on the cattle; there remains $285 due, which was to be paid on the 1st of December, 1861. . . . . About the last of August, 1861, the Defendant came to my house, and wanted to know of me if I had sold my steers; I told him I had not. He wanted to know what I asked for them; I told him my price. He told me what he would give me; I told him I would split the difference with him. He said he would give me what he offered, and no more; and I finally agreed to accept his offer, which was to give me $290 for the fifteen head of cattle. He told me he was butchering at Painted Post, and that he wanted the cattle, so that when cattle got scare he could come and get them; and that if, at any time before the first of December, he wanted them, or any of them, to butcher, he could come up and get them. He asked me if I wanted any money to bind

the bargain; I told him I did not care about it at that time. He said, 'If any one asks you if the cattle are sold, tell them you have sold them to me. And if any one asks me, I will tell them I have bought them.' "

"Something was then said about keeping the cattle, and I told him they might run there until the first of December, if he saw fit to let them run there until that time. He said he bought them expressely that he might get them whenever he wanted them, as he was in the butchering business. . . . . The cattle at that time were all on the plains, about fifty or sixty rods from us. . . . . Defendant had before that day seen the cattle. . . . . The price was to be paid on the first of December. If he wanted any of them to butcher before the first of December, he was to come and take them. . . . .

"The next day, or next day but one, I was at the Post, and he wanted to know if I had turned the cattle on the flats. I told him I had not, but would do so that night; and I did turn them on the flats after I went home. Then I told him I was in want of some money. He said, 'You are not afraid I am going to back out?' 'No,' said I, 'but it is best that we bind the bargain, so that there will be no chance to back out.' . . . . He said he could not let me have five dollars, but he would let me have three dollars, and two weeks from that day would pay the other two, which he did."

He further testified to the subsequent direction by the Defendant to remove a part of the cattle from the flats back to the plains, with which the Plaintiff complied; and that, in the last of September or first of October, the several cattle which remained on the flats were carried off by a flood and drowned. There was much other evidence, but the testimony is sufficient on the part of the Plaintiff to present the question discussed, in the opinion of the court.

The Defendant moved for a nonsuit, on the ground that the contract was void by the Statute of Frauds, inasmuch as there was no note or memorandum in writing, no delivery of any part of the property bargained for, and no part of the pur-

chase-money was paid *at the time;* that the transaction proved was not a present sale, but an executory agreement for a future sale and delivery; and Plaintiff had not shown performance, or tender of performance, but, on the contrary, had shown that he was unable to deliver at the time stipulated.

The motion was denied, and the Defendant excepted.

The Defendant then gave evidence in regard to agreement, the condition of the cattle, the loss thereof, and evidence bearing on the question of negligence in the case of the cattle. He in no respect qualified or contradicted the tesimony of the Plaintiff in respect to what took place when the money was paid to bind the bargain, or to his giving directions to change the pasture, or to the agreement that he was at liberty to go at any time and take the cattle as he wanted them for butchering.

The Defendant's counsel again insisted, and requested the Judge to charge, that there was no delivery of the cattle at the time the bargain was made, and nothing was done which would constitute a delivery, and that the bargain was void by the Statute of Frauds.

The Court refused so to charge in either respect, and held that whether there was or was not a delivery and acceptance, and subsequent bailment, were questions of fact for the jury under the evidence; to which the Defendant excepted. The Court submitted the question to the jury, whether the bargain was an executory agreement to sell the cattle and deliver them at a future day, in which case he charged their verdict must be for the Defendant; or the transaction was a present sale and delivery of the cattle by the Plaintiff to the Defendant, and the Plaintiff was only to keep them afterwards as bailee of the Defendant; in which case the Plaintiff was entitled to recover, unless the cattle, or some of them, were lost through the Plaintiff's negligence. To this the Defendant excepted.

The Court charged, in respect to negligence, that the Plaintiff, as bailee, was only bound to take such care of the property as careful and prudent men usually take of their own property. And to this the Defendant excepted.

The jury found a verdict for the Plaintiff. On the hearing of exceptions, in General Term, the Court ordered a new trial, on the sole ground that the agreement was void by the Statute of Frauds. The Plaintiff stipulated and appealed to this Court.

Geo. B. Bradley for Appellant.
C. Rumsey for Respondent.

WOODRUFF, J.—The jury have found, in this case, that the transaction between the Plaintiff and Defendant was not a mere executory contract to sell and deliver at a future day.

There was evidence to justify the submission of that question to the jury, and sufficient to sustain their finding. The Plaintiff's testimony is in terms to an absolute sale. A complete meeting of the minds of the parties upon the fact of sale, and the price to be paid, and the right of the Defendant to take the cattle when he saw fit, and to this there is no contradiction. The Defendant's testimony on this point corroborates the Plaintiff. Nothing whatever remained to be done by either party to entitle the Defendant to claim the property, or the Plaintiff to demand the price at the expiration of the agreed credit. The Plaintiff did not even reserve his lien on the cattle for the price.

The Defendant was entitled to take away the cattle from time to time, as he might wish to butcher them, and without further leave or license from the Plaintiff. The Plaintiff was not even bound by the agreement to make a delivery; the Defendant was "to come and get them." This is several times reiterated in the testimony, and also in a more decisive form. "If he wanted any of them to butcher before the first of December, he was to come and take them away."

The parties declared their understanding of it at the time as an actual sale. The jury was warranted by the evidence in finding this; it is in direct accordance with uncontradicted testimony. This constituted a present sale of the property at the common law, by which title passed to the purchaser, and

by which the vendor's right to the purchase-money was perfect.

To the binding legal effect of such a sale, at the common law, delivery of the property is not necessary to vest the title in the purchaser, or to place the property at his risk; nor is it necessary that actual payment of any part of the price should be made. On the contrary, the sale may be perfect, the title pass, and the property to be at the risk of the purchaser, and yet the vendor retain the possession, and have complete right to retain the possession, until the price is paid, and to compel payment before delivery.

Here the agreement went further: it waived all lien for the price, and left the cattle entirely at the pleasure of the purchaser, to take and kill whenever he saw fit. Upon this finding of the jury we are, therefore, to treat this transaction as a present absolute sale at the common law, by force of which the title of the cattle vested in the Defendant; the right of the Plaintiff to have the purchase-price at the expiration of the term of credit complete. And the cattle remained on the Plaintiff's land, subject to the Defendant's right to take them at his pleasure; but meantime to be at his risk. The Judge submitted to the jury the further question, as an alternative to the other, viz., whether this transaction was a present sale and delivery of the cattle to the Defendant; and the jury have found that it was. They thus deny that it was an executory agreement for a future sale. They affirm that it was a present sale, and also that it was accompanied by a delivery of the cattle to the Defendant. The finding that it was an absolute sale was supported by the evidence, as I have shown. If the evidence of delivery was such as would warrant the submission of the question of delivery to the jury, and would justify their finding that although the cattle remained for pasture on the land of the Plaintiff, he was to keep them as bailee of the Defendant, his subsequent directions from time to time to change their place of pasture indicating his acceptance thereof, then not only all the requisites to a complete sale at the

common law were complied with, but the Statute of Frauds was fully satisfied.

The Court below, in setting aside the verdict, have not regarded this finding of the jury, that there was an actual delivery satisfying the requirements of the Statute of Frauds, as warranted by the evidence, and have held that the motion for a nonsuit should have been granted. The cattle were agreed to be at the Defendant's disposal, with authority to take them at his pleasure. His directions as to the place where they should be pastured were given from time to time; and the Plaintiff submitted to his authority, and obeyed his instructions in the keeping of the cattle, and as to driving or placing them where he directed.

The argument is by no means trivial, that the acts of the Plaintiff in removing the cattle to the place designated by the Defendant, and the Defendant's assumption of dominion over them by directing their removal, submitted to by the Plaintiff, warranted the jury in finding delivery and acceptance; that although the cattle remained upon the premises of the vendor, in his charge and keeping, yet that he no longer held them as owner, and yet had no control over them, except as bailee of the purchaser; that the character in which he held possession was changed; and therefore, as in Marvin *v.* Wallace (37 Eng. L. & Eq. R. 6), the jury were justified in finding delivery and acceptance. In that case the sale of a horse was made, and without any actual delivery to the buyer, the vendor asked the buyer to lend the horse to him for use, for two or three weeks, and the buyer consented, and the horse was retained and used by the vendor accordingly. This was held to change the character of the holding by the latter, and to amount to a delivery and acceptance; as also in Elmore *v.* Stone (1 Taunt. 458), where, on an oral sale of two horses, the buyer requested the vendor to keep the horses at livery for him, to which the vendor consented, and thereupon removed the horses from his sales stables to another stable, where he kept horses at livery.

This was held to amount to delivery and acceptance, under the Statute of Frauds.

But without pursuing this branch of the subject, or expressing any opinion thereon, there is another ground upon which the contract is valid under the Statute of Frauds, and entitled the Plaintiff to retain his verdict, and upon which the nonsuit was rightfully denied.

The sale was a present sale, valid at the common law. The Statute of Fraud requires, where the price of the property is fifty dollars, one of three requisites to a legal sale: 1st. That there shall be a note or memorandum in writing, subscribed, &c.; or, 2d. That the buyer accept and receive part of such goods, &c.; or, 3d. That "the buyer shall at the time pay some part of the purchase-money."

The motion for a nonsuit, and the order appealed from, proceed upon the ground that neither of these three requisites were complied with. There was no writing; that is certain. I do not deem it necessary to add anything to what I have said as to delivery and acceptance.

But upon the effect of the transactions of the day following the first oral treaty for the sale, particularly described by the witnesses, I think the decision of the Supreme Court was erroneous. The testimony stands uncontradicted, that on the day when the parties first met and orally agreed to the terms of sale, the Plaintiff was asked by the Defendant if he wanted any money to bind the bargain, and he said he did not at that time. This plainly indicated that they were then conscious that what had been done was not legally binding. That it rested in their confidence in that sense of honor, influenced by which men often say, "My word is as good as my bond."

The next day, or day but one afterwards, the parties had an interview; then the Plaintiff had changed his mind, and frankly told the Defendant that he thought it best that the bargain should be made legally binding, thus: "Then I told him I was in want of some money. He said, 'You are not afraid I am going to back out?' 'No,' said I; 'but it is best that we bind the bargain, so that there will be no chance to back out,' "

&c.; and thereupon three dollars was paid, and, at a subsequent day, two more.

Here is a distinct, intelligent reference by both parties to the negotiation of the previous day; a recognition by both of its want of binding force or validity, because no part of the stipulated price was paid; a declared intent to make the bargain valid and binding, assented to; a request for the payment of the money for that purpose, and a payment in compliance with that request.

I do not think it necessary, in order to sustain the verdict in this case, to say that the words "at the time," introduced by the revisers in this section of the Statute of Frauds, have no meaning, or can be disregarded; nor to say that every payment on account of a previous oral agreement for a sale, operates per se, and necessarily as a reiteration and affirmance of that oral agreement.

But the latter conclusion by no means abrogates those words in the Statute; and the argument is plausible, at least, that where the parties have made such an agreement complete and operative in all respects but for the Statute, and afterwards one offers payment on that contract, his act is an offer to enter into the relation and obligation which the terms thereof are apt to create, and of part performance of its duties; and if the other accepts the payment on the contract, his act is a then present declaration or affirmation of his assent to the conditions of the agreement, and an acceptance of its performance.

At that very time the minds of the parties do actually meet in the fact of sale, and then there is a bargain made or adopted, and *at that time* part of the purchase-price is paid. Before that time there had been treaty and words of agreement, but having no legal force. Now, by plain reference, though not by recital, the agreement is re-enacted. The terms are present in the minds of the parties, and are affirmed by payment and acceptance on account thereof.

This view of the subject does not abrogate the words, "at the time" of the agreement. The agreement, as originally expressed and assented to, is not binding. The Statute declares

it void, because no part of the price was paid, and so the Statute has full and complete operation upon it. The vendor is not bound, the title has not passed, the property remains liable to execution against him, and all the evils the Statute intended to remedy by declaring that a mere verbal sale shall not be valid are obviated or prevented. And, moreover, if those words were not found in the Statute, it might be claimed that a subsequent payment of a part of the price not only made the sale complete, but retroacted to make the agreement valid and binding ab initio, and according to all the legal and incidental effects which would pertain to it had it been originally binding.

Now, according to the argument above suggested, the original treaty has, by force of the Statute, no legal operation. It is competent, nevertheless, for the parties to make the purchase and sale, and to make such purchase and sale upon precisely the same terms and conditions as were expressed in such previous bargain. This may be done by reference thereto; and payment accepted on account thereof may be deemed a reproduction of all those terms and conditions in the minds of the parties,—a meeting of those minds in their present mutual assent thereto, and a compliance with the Statute by payment and acceptance of part of the price. Then there is a present, and not merely a past agreement of sale, and payment "at the time" of part of the price. Thenceforth the agreement of sale may operate and be effective. This reasoning neither does violence to the Statute, nor abrogates or disregards the words thereof. And it is in harmony with the intent to prescribe and insist upon the Statute requisite to give it validity, and to remedy the evils against which the Statute was intended to guard. The present case, however, does not require that this construction of the Statutes should be affirmed in order to sustain the verdict of the jury.

It cannot be denied that although the parties had not in the first instance made a valid agreement, they had a right and were fully competent to make one. If they were satisfied with the terms to which they had before assented, it was wholly

unnecessary that they should change them in any particular. It was surely enough that, with avowed consciousness that they were not yet bound, they should mutually agree to a sale, and, for the purpose of giving it complete legal validity. do just what they believed to be, and what the Statute declares to be, indispensable. All this was done in the present case.

Both actually indicated their knowledge that the bargain theretofore lying in words did not bind them. They both in terms referred to that bargain as a transaction the import of which was in their minds.

The clear intent and purpose now to enter into such transaction as should bind each, according to the terms before assented to, was expressed. For that purpose money was asked, and for that purpose money was paid.

Could this transaction have borne any other character, or been any more intelligible, or of any greater legal effect, if the Plaintiff on that occasion had in words said to the other, "We yesterday agreed, I to sell, and you to buy, my fifteen head of cattle, then in our view feeding on the plains," &c., recapitulating the precise bargain. "We are both aware that that agreement bound neither of us, because no part of the price was paid. I propose to sell the cattle to you upon those terms, and that you should pay me a part of the price," to which the Defendant replied, "I assent," and thereupon makes payment.

No sensible distinction can be pointed out between such a transaction and that in which the parties did engage, with express consciousness that the former treaty did not bind them, and with the expressed intent to become bound to the purchase and sale.

When the Plaintiff went to the Painted Post, on the day last referred to, it may be assumed (irrespective of the question of the sufficiency of the delivery, which is above alluded to without expressing any opinion) that although the parties had each assented to the sale, there was no binding agreement, because the Statute was not complied with. They desired and intended to make a valid sale.

Either of these things might be done; an agreement might

be reduced to writing, in the terms of the previous oral treaty; or, 2d, actual delivery of one or more of the cattle might be made and accepted; or the parties might manifest their assent to a sale upon those terms, and pay a part of the price. This is not doubtful, and in either case the sale would be binding.

Who shall prescribe the precise form of words in which such mutual assent to the sale shall then be declared? The form is not of the substance of the matter. It is enough that the language and acts of the parties clearly express it; and it may be done as well by reference to it as then present in the mind and memory of both, as by the idle form of recital or repetition.

In my opinion, the money paid in this case, on the occasion last referred to, was a payment of a part of the price at the time of the agreement, within the only reasonable meaning and intent of the statute.

I think, therefore, that the order granting a new trial should be reversed, with costs, and the Plaintiff should have judgment upon the verdict, with costs.

JOEL TIFFANY,
State Reporter.

JOHN E. STONE, RESPONDENT, *v.* THE WESTERN TRANSPORTATION COMPANY, APPELLANTS.

Master and servant—Negligence.

The master is liable for damages occasioned by the negligence of his servant in performing the duties imposed upon him by the terms of his employment.

Where Defendants had hired Plaintiff to keep for them horses by the week, Defendants furnishing a servant to take charge of the horses; and the said servant, in taking care of the same conducted so negligently, that he caused Plaintiff's barn and contents to be burned: *Held*—Defendants were liable.

John Hubbell for Appellant.
C. Carskaddan for Respondent.

Instructions—Exceptions—Extent of review. 8 *Misc.* 294 (59 *St. Rep.* 210; 28 *N. Y. Supp.* 574; 31 *Abb. N. C.* 440).

MASON, J.—This action was brought to recover the value of a quantity of hay and oats, some wagons, harnesses, farming utensils, &c. This property, at the time it was destroyed by fire, was in a barn in the possession of the Plaintiff, in which a number of horses belonging to the Defendant were being wintered, under a written contract between the Plaintiff and the Defendant, in which the Plaintiff agreed to keep twenty horses for the Defendant through the winter, and to furnish and supply said horses with good and commodious stables and yard room, and to furnish an abundance of hay for food, and salt for the use of the horses, and to furnish sufficient straw for bedding, and to keep constantly a sufficient supply of water conveniently situated for the use of said horses, and to furnish lamps, oil, and all tools which may be requisite or necessary in grooming or taking care of said horses, and to furnish a man and team to assist in leading the said horses to the tow-path of the Erie Canal in the spring, or when said horses may be required by said Company. The Plaintiff also agreed to board a man for the said Defendant, at two dollars per week, in case the Defendant may require a man to take care of said horses. I think it pretty clear, taking this contract as a whole, that it contemplated the Defendants should furnish a man to take care of the horses.

It is true the Plaintiff agreed to keep these horses for ninety cents per week for each horse. But here are the positive undertakings specifically provided: to furnish hay for food and straw for bedding, and such quantities of salt as may from time to time be required for the use of said horses, and lamps, oil, and tools which may be requisite or necessary in grooming or taking care of said horses, and to keep constantly a good and sufficient supply of water conveniently situated for the use of said horses.

There is no agreement to furnish a man to feed and groom the horses, but there is an agreement to board the Defendants' man for two dollars per week, if the Defendants should require it. And there is also an agreement to furnish a man and team to assist in sending the horses to the Canal in the spring. The

parties contemplated that the Defendants would furnish a man to feed and take care of the horses. Be this as it may, however, the contract gave the Defendants this right, to put the horses in charge of their own man to feed and groom, and the Plaintiff agreed to board him for two dollars per week. This man must be deemed the servant of the Defendants, and not of the Plaintiff.

The Defendants admitted the existence of their Corporation, by merely denying the allegations of the complaint in their answer. It was decided in the case of The Bank of Genesee v. The Patchin Bank, that the provisions of the Revised Statutes, dispensing with proof in such case, was not repealed by the Code. (3 Kern. 309.) If there were any doubt on this subject it is removed by chapter 422 of the Laws of 1864, which provides that, in suits brought by or against a Corporation, created by or under the laws of this State, it shall not be necessary to prove, on the trial of the cause, the existence of such Corporation, unless the Defendant shall have alleged, in the answer in the action, that the Plaintiffs (or Defendants, as the case may be) are not a Corporation. (Laws of 1864, p. 1007, § 3.) The exceptions, therefore, taken by the Defendants to the evidence given by the Plaintiff, to prove the Defendants a Corporation, are wholly unavailing, if well taken. The charge of the Judge is wholly unexceptionable. The Defendants have no such exceptions taken as can subject the charge to review here. The charge embraces all the points and propositions in the case, and at the close the case states that the Defendants except to each proposition of the charge, excepting that in reference to the Plaintiff's contributing to the injury. Where the charge of the Court contains several propositions, and as to some of them it is unobjectionable, an exception taken to each and every part of the charge presented no questions for review on a bill of exceptions. (Caldwell v. Murphy, 1 Kern. 416; Jones v. Osgood, 2 Seld. 233; Newell v. Doty, 33 N. Y. 83.)

The only remaining question in the case arises on the Defendants' motion for a nonsuit, and which was properly overruled by the Court. The Defendant stated seven grounds of

motion for a nonsuit. The first is, that the incorporation of the Company is not proved. The answer to this has already been given; the fact stands admitted by the Defendants' answer, and besides it was fully proved.

The second is, that there is no evidence of authority from the Company to make the contract. This objection is a good one, if true.

The contract was made in behalf of the Defendants by Jacob Coom, who was at the time in the employ of the Defendants, and who swears that he executed the contract by direction of J. R. Chipps, and that Kelsey, who was the Defendants' general superintendent, wrote him that he had engaged Chipps as his assistant, and Kelsey swears that he had hired Chipps as his assistant; and when to this is added the fact that the Defendants sent their horses to the Plaintiff to keep, under the contract, and that he had actually kept them three or four weeks when the fire occurred, there certainly was evidence for the jury sufficient to submit the case to them.

The third ground is, that there was no evidence that Brophy was an agent or in the employ of the Defendants. Brophy swears he was in the employ of the Defendants at Syracuse, taking care of horses in stables there, and had been three or four months, and that he went with these horses to the Plaintiff, to take care of them, by the direction of Baker, who kept a station at Rochester. James Clarke swears that he resides in Syracuse, and was in the employ of the Defendants, and was station agent at Syracuse, and that Brophy was in the employ of the Company; and that Baker came there in the night to get the horses off the Canal, and said that Brophy was going to Oneida with the horses, and he says that he had told Kelsey that Brophy would be a good man to winter the horses.

Now, Kelsey swears that he had sent Baker down to lead the horses to winter quarters, and that it would be his business to get a man such as he pointed out to him to take care of them, and he says that he has not any doubt but that he recommended this Brophy to Baker, and he swears that Brophy was recommended to him by Clarke, and he states further that he sup-

posed Baker put him into this stable. This, certainly, was quite sufficient to submit this question of Brophy's employment to the jury.

The fourth ground is, that, upon the evidence in the case, the Defendants were not liable. This was clearly a question for the jury. If this hay and barn were set on fire by the negligence of the Defendants' servant, of which there can be no doubt upon the evidence, I take it to be very clear that the Defendants are liable while the rule remains that the master is responsible for the negligence of his servant. The position assumed by the Defendants' counsel, in his argument here, that Brophy is not to be deemed the servant of the Defendants, cannot be sustained, and besides, the jury have found that fact against the Defendants.

There is nothing in the contract which places Brophy under the dominion and control of the Plaintiff. On the contrary, the contract is cautiously drawn to avoid any such thing. The Plaintiff agrees to furnish hay for food, straw for bedding, a convenient supply of water at all times, to furnish lamps, oil, and all tools which may be necessary in grooming and taking care of the horses, etc. It is apparent from the contract that the Defendants preferred to place the charge and control of the horses, and their feed and water, grooming, etc., in the hands of their own man, and they did so, and must be held responsible for his negligence.

The fifth ground is, that there is no evidence of negligence on the part of the Defendants. The Defendants are liable for the negligence of their servants, and the evidence is very clear that Brophy, the Defendants' servant, was negligent. He went into the barn with a glass lantern, filled with kerosene oil, and took it upon the hay-loft, and carelessly placed it upon a beam, to which the hay nearly or quite approached, and probably, as he confesses, knocked it off with the pitchfork, and set the hay and barn on fire; and the negligence was clearly proved.

The sixth ground of objection is, that the negligence on the part of the Plaintiff, in furnishing a kerosene lamp, contributed to this injury. The Plaintiff directed Brophy to hang the

lamp upon a peg on the lower floor, but instead of that he took it upon the hay-loft. The contract required the Plaintiff to furnish such a lantern, and also to furnish oil. This may be construed to mean kerosene oil, as this article is now more in common use in such lanterns than any other oil. At any rate, it can hardly be charged as an act of negligence to furnish an article now in so common use, as most of the lanterns in use are constructed for using such oil. Had Brophy hung this lantern on the peg, provided for that purpose by the Plaintiff, this fire never would have occurred; and but for his gross negligence in carrying it upon the hay-loft, this action never would have been brought. This answers the seventh and last point raised on the Defendants' motion for a nonsuit, which is, that the evidence shows that this fire was the result of an accident. The fire was the result of Brophy's gross negligence.

The cause was properly submitted to the jury, and the judgment should be affirmed.

JOEL TIFFANY,
State Reporter.

ABRAM FITCH et al., Appellants, v. ADRASTUS SNEDAKER, Respondent.

Contract—Offer of Reward—Information given before offer—Assent.

Where the Defendant offered a reward "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of a certain unknown female," such reward is not payable to one who never saw the offer until after the apprehension of the criminal, and who did nothing to promote such apprehension after the offer of reward was made, notwithstanding the apprehension was effected in consequence of information given by him before the reward was offered, and notwithstanding, also, he was active in procuring and giving evidence and communicating facts to the prosecuting officers after such apprehension, and on the trial, in the hope and expectation of receiving such reward.

Such an offer proposes compensation for what shall be done thereafter, not for what has been done already; and unless information be *thereafter*

Reward—Knowledge—Information. 51 *N. Y.* 605; 51 *App. Div.* 46 (64 *N. Y. Supp.* 398). 43 *How. Pr.* 197.

given which leads to both apprehension and conviction, the reward is not payable.

WOODRUFF, J.—On the 14th of October, 1859, the Defendant caused a notice to be published, offering a reward of two hundred dollars "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of a certain unknown female."

On the 15th day of October, before the Plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail; and though not in terms so stated, the case warrants the inference, that by means of the evidence given by the Plaintiffs on his trial, and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial, the Plaintiffs proved the publication of the notice, and then proposed to prove that they gave information before the notice was known to them which led to the arrest of Fee. This evidence was excluded. The Plaintiffs then offered to prove that, with a view to this reward, they spent time and money, made disclosures to the District Attorney, to the Grand Jury, and to the Court on the trial, after Fee was in jail, and that without their effort, evidence, and exertion, no indictment or conviction could have been had. This evidence was excluded.

The Court thereupon directed a nonsuit.

It is entirely clear that in order to entitle any person to the reward offered in this case, he must give such information as led to both apprehension and conviction; that is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, unless conviction followed; both are conditions precedent. No one could therefore claim the reward who gave no information whatever until after the apprehension, although the information he afterwards gave was the evidence upon which conviction was had, and however clear it may be that had the information been concealed or suppressed there could have been no conviction.

This is according to the plain terms of the offer of a reward, and is held in Jones v. The Phœnix Bank (8 N. Y. Rep. 228); Thatcher v. England (3 Com. Bench R. 254). In the last case it was distinctly held that, under an offer of reward payable "on recovery of property stolen, and conviction of the offender," a person who was active in arresting the thief, and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property, and producing pawnbrokers with whom the prisoner had pledged it; and who incurred much trouble and expense in bringing together witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery.

In the present case, the Plaintiff, after the advertisement of the Defendant's offer of reward came to his knowledge, did nothing toward procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to therefore establish that if no information came from the Plaintiffs which led to the arrest of Fee, the Plaintiffs are not entitled to recover, however much the information they subsequently gave and the efforts they made to procure evidence may have contributed or even have caused his conviction; and therefore evidence that it was their efforts and information which led to his conviction was wholly immaterial, if they did not prove that they had given information which led to his apprehension, and was properly rejected.

The question in this case is single; a murderer having been arrested and imprisoned in consequence of information given by the Plaintiff before he is aware that a reward is offered for such apprehension, is he entitled to claim the reward in case conviction follows?

The ruling on the trial, excluding all evidence of information given by the Plaintiffs before they heard of this reward, necessarily answers this question in the negative.

The case of Williams v. Carwardine (4 Barn. and Adolph. 621), and same case at the assizes (5 Carr and Payne, 566), holds that a person who gives information according to the

terms of an offered reward is entitled to the money, although it distinctly appeared that the informer had suppressed the information for five months, and was led to inform not by the promised reward, but by other motives.

The Court said the Plaintiff had proved performance of the condition upon which the money was payable, and that established her title: that the Court could not look into her motives. It does not appear by the report of this case whether or not the Plaintiff had ever seen the notice or handbill posted by the Defendant, offering the reward; it does not therefore reach the precise point involved in the present appeal.

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal any other rules than are applicable to any other offer by one, accepted and acted upon by another, and so relied upon as constituting a contract.

The form of action in all such cases is assumpsit. The Defendant is proceeded against as upon his contract to pay, and the first question is, was there a contract between the parties?

To the existence of a contract there must be mutual assent, or, in another form, offer, and consent to the offer. The *motive* inducing consent may be immaterial, but the consent is vital; without that there is no contract.

How, then, can there be consent or assent to that of which the party has never heard? On the 15th day of October, 1859, the murderer Fee had, in consequence of information given by the Plaintiffs, been apprehended and lodged in jail. But the Plaintiffs did not, in giving that information, manifest any assent to the Defendant's offer, nor act in any sense in reliance thereon; they did know of its existence.

The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the Plaintiffs after they heard of it. It was prospective—to those who will in the future give information, &c. An offer cannot become a contract unless acted upon or assented to. Such is the elementary rule in defining what is essential to a contract. (Chitty on Conts., 5th Am. Ed., Perkins' notes, p. 10, notes a and 2, and cases cited.)

Nothing was here done to procure or lead to Fee's apprehension, in view of this reward. Indeed, if we were at liberty to look at the evidence on the first trial, it would appear that Fee was arrested before the Defendant offered the reward. I think the evidence was properly excluded, and the nonsuit necessarily followed.

The judgment should be affirmed.

JOEL TIFFANY,
State Reporter.

CHARLES STARBIRD, APPELLANT, *v.* SAMUEL H. BARRONS, EDWARD KIRK, AND NATHANIEL LAIRD, RESPONDENTS.

Contract—Failure of performance by one party—Recission—Damages.

In every contract between parties, where the performance by one party presupposes some act to be done by the other party prior thereto, or contemporaneously therewith, the neglect or refusal to perform such act not only dispenses with the obligation which the other party was under to perform on his part, but, where the circumstances are such that a recission of the contract will not afford an adequate remedy to the party who was ready to perform, he is entitled to a recompense against the delinquent equal to the damages which such delinquency caused him.

If the special circumstances under which a contract is made be communicated by Plaintiff to Defendant, the damages resulting from a breach of such contract, being such as might have been reasonably contemplated by the parties on such failure, would be a proper measure of the amount to be awarded by the jury for such breach.

THIS is an appeal from a judgment of the General Term of the Supreme Court in the Seventh District, affirming a judgment of the Special Term in the same district, denying a motion for a new trial after verdict for Defendants at the Circuit.

The case presented by the record is substantially as follows:

On the 10th day of November, 1858, the Plaintiff, who was owner and master of a canal-boat then lying at Rochester, entered into an agreement with the Defendants, who were part-

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Contract—Recission—Election of. 4 *Misc.* 439 (54 *St. Rep.* 140; 24 *N. Y. Supp.* 496).

Contract—Breach—Damages. 51 *How. Pr.* 42.

ners engaged in buying and shipping potatoes, by which agreement the Plaintiff engaged to carry a boat-load of potatoes, five thousand bushels, and more if his boat would hold them, from Rochester to New York, during the then season of canal navigation. The Defendants engaged to load the boat within three days. They were to get the boat off within three days without fail. There was a break in the canal, three or four miles east of Rochester, which it would take about two days to repair. The Plaintiff wanted to get ahead of the crowd of boats, and so informed the Defendants. The Plaintiff was to have his boat at the Defendants' warehouse, near the mouth of the feeder, east of the weigh-lock, between twelve and one o'clock on the day of the contract, and was to receive at New York thirteen cents per bushel freight, except $200, which was to be advanced to him at Rochester, to pay tolls.

The Plaintiff had his boat at the time and place appointed, but the Defendants were eight days and over, instead of three, in getting the boat loaded.

The Defendants did not furnish a full load within five hundred or six hundred bushels; and the Plaintiff so informed the Defendants the night before starting.

On the night of Thursday, the 18th of November, as soon as the load was on board, the Plaintiff started with his boat, one of the Defendants going with him. The only difficulty which the Plaintiff at first encountered was the crowd of boats that got ahead of him, the breach in the canal having been repaired so that the boats began passing on the previous Saturday.

At Fultonville, some miles west of Schenectady, the boat encountered ice, and with great difficulty was pushed forward, by the 8th of December, to Schenectady, where she was frozen in for the winter.

At Schenectady the Defendants took charge of boat and cargo for the winter, under an alleged engagement that nothing should be done to injure the boat. The Plaintiff claims that the boat was greatly injured while in the Defendants' care at Schenectady, through their negligence.

The Defendants, at Schenectady, took out 1,200 bushels of

the potatoes and sent them to New York by railway, and directed the Plaintiff to take the residue to New York in the spring, which he did, reaching New York April 16.

At New York the Plaintiff was detained in unloading fifteen days, when he could have been unloaded, as was claimed, in twelve hours; the Defendants taking off the load only as they sold it out. The usual time for unloading is three days.

The Defendants paid freight, but refused to pay damages.

The Plaintiff brought this action to recover damages for the failure of the Defendants to furnish a full load for the boat; for the delay in loading; for the consequent failure of the Plaintiff to get through to New York that season; for injury to the boat at Schenectady; and for unnecessary delay in unloading at New York.

On the trial, the Court excluded nearly all the evidence offered on the part of the Plaintiff to show his damages, and the jury found a verdict for the Defendants, upon which judgment was entered, which was affirmed at the General Term, from which judgment the Plaintiff appeals to this Court.

Selden for Appellant.

C. Jordan for Respondent.

BACON, J.—The ruling of the Judge upon the trial, excluding the evidence offered on the part of the Plaintiff, by which he proposed to show that he was not responsible for the potatoes being frozen, was, it seems to me, manifestly erroneous. This offer was first made at Circuit, at folio 155 of the case, and rejected, and an exception taken, and was again repeated just at the close of the testimony, in the following item: "The Plaintiff then offered to show that the Defendants took charge of the boat at Schenectady, and undertook to guard the cargo, and to show that the potatoes froze by their default, and the Plaintiff was not responsible for their freezing; this proof to be used on the question of demurrage." This offer was objected to and rejected, and the Plaintiff excepted.

That the pertinency of this proffered proof may be perceived, it is necessary to state that in the answer of the Defendants they

had set up a counter-claim, among other matters, for the sum of $200 "for loss on frozen and rotten potatoes;" and on the trial one of the Defendants was examined on this subject, and gave testimony, without objection, that the potatoes were frozen under the horse-stable in the boat, five feet thick and two feet deep at the top, and that it took a long time to pick out the frozen ones, &c.

The precise object, for which this evidence was given was not stated, but it must have been offered in one of two aspects, or perhaps to subserve two purposes: to wit, either to create a counter-claim to any damages the Plaintiff may be supposed to have established, or to meet the claim for demurrage, by giving evidence tending to show that any delay occasioned by the time required to unload the boat was caused in good part, if not wholly, by the carelessness and negligence of the Plaintiff in respect to the cargo.

If in either view it was material, as it seems to have been considered, then it clearly was the right of the Plaintiff to offer this rebutting and explanatory evidence.

Although most of the testimony which was offered by the Plaintiff to show his alleged damages was excluded by the Judge, yet he was at liberty to claim, under the restricted rule of the Court, that for the space of five or six days he was detained at Rochester, before the loading of his boat was completed, he was entitled at least to the value of the use of the boat for that period, for the jury might find upon the evidence that it was owing to no fault of his that such delay occurred, but was solely chargeable to the Defendants. If so, this claim could only be successfully met and overcome by establishing on the part of the Defendants some counter-claim that would offset and extinguish it; and upon hardly any other theory than this can the verdict, which is general for the Defendants, be accounted for. It was therefore not only pertinent, but very material, that the Plaintiff should be allowed to give evidence which should meet and repel this counter-claim, and show that, under the circumstances proposed to be established by the evidence, it had no valid existence.

Upon the question of demurrage, also, for which it was in the second instance specifically offered, it was, it seems to me, equally pertinent. The jury might well, upon the evidence as it stood, be justified in concluding that the condition of the cargo was such, that greater expedition than was made in discharging it was not possible, and could not in fairness be demanded of the Defendants. And yet it was true that this state of things was brought about by the culpable default of the Defendants themselves, and by a violation of their own prior undertaking to guard and secure the cargo against the occurrence of the very thing that caused the delay. The Plaintiff was manifestly entitled to give this explanation, and thus meet and repel the claim to exemption founded on the Defendants' evidence. Upon both grounds the testimony should have been admitted, and the exclusion was erroneous.

If I am right in this conclusion, the judgment must be reversed, and a new trial granted; and in that event it may be expedient that the other question principally discussed upon the argument should be passed upon by this Court. Upon the trial, after the Plaintiff had testified that, by the contract, the Defendants were to load the Plaintiff's boat in three days from the 10th of November; that the necessity for this arose from the fact that, in consequence of a break in the canal, which it would take two days to repair, a crowd of boats were lying west of the Defendants' warehouse, and therefore it was essential that the Plaintiff should be loaded and be able to start in advance of this fleet, and thus gain time, which at that season was all-important; that this fact was explicitly stated to the Defendants, as the reason why it was necessary to be thus expeditious, and that, by the contract, it was imperative upon the Defenedants to get the Plaintiff loaded within the time specified; the Plaintiff offered to show that, after Saturday, the 13th of November, and before he was ready to start, a crowd of boats had passed on east ahead of him. This was objected to by Defendants' counsel, as being too remote and as not material, and was rejected, and the Plaintiff excepted. The offer was again repeated, coupled with an offer to show

the damages caused by the delay to the Plaintiff, and again rejected; and finally the Plaintiff offered to prove that he went forward with all diligence; could get no further than Schenectady, in consequence of the ice, and that this was caused by the delay of the Defendants at Rochester. This offer was objected to on the ground of immateriality, and the objection was sustained by the Court, and the Plaintiff excepted.

In passing upon these objections, we have of course the right to assume the existence of the facts which had been testified to, and that the jury would have found in accordance with them; and, therefore, that it was proved that the contract was absolute that the boat should be loaded in three days, and the Defendants were informed of the precise state of things which made this necessary and imperative.

What, then, is the rule of damages applicable to such a case? It is true, then, as the Court in the opinion given at Special Term assume, that, as the Defendants had failed to perform on their part, the Plaintiff was not only at liberty, but it was his duty to refuse to undertake the performance of the contract on his part; and thus a right of action would exist, in which the only damages would be the difference between the ordinary rate of transportation of similar property and the rate agreed to be paid to the Plaintiff, if the difference was in his favor, with the value of the use of the boat while held in readiness to receive a load within the three days provided for in the contract?

Beyond all doubt the Plaintiff was at liberty, on the failure of the Defendants to perform the engagement on which his depended, to rescind the contract, and claim at least such damages as are indicated in the opinion of the Court; but whether, under such a state of things, that would be the entire measure of damages, may well be questioned. But I do not understand that a party is not at liberty, if he thinks he sees a fair prospect, or, indeed, but a reasonable hope that he may still perform, notwithstanding the default of the other party, to go on and complete his engagmeent, and earn the compensation to which in that event he will be entitled; and if he

ultimately fails, despite a strenuous effort to perform, to accomplish the result, that he cannot claim all the damages, and repair the losses he has suffered by the default of the other party. While a party thus situated is at liberty to rescind a contract, he is not obliged to do so; and especially is he under no obligation to do this when it is not probable that a rescission will afford him a remedy adequate to the damages he has sustained.

The principle which should govern such a case as this is nowhere more clearly stated than by Judge Denio, in the case of Cross *v.* Beard (26 N. Y. 88), and it is, in my judgment, the true rule applicable here. "In every contract," he says, "between parties, where the performance by one of them presupposes some act to be done by the other party prior thereto, or contemporaneously, the neglect or refusel to perform such act not only dispenses with the obligation which the other party was under to perform on his part, but, where the circumstances are such that a recission of the contract will not afford an adequate remedy to the party who was ready to perform, he is entitled to a recompense against the delinquent equal to the damages which such delinquency has caused him." Applying the principle here enunciated to this case, I think the Plaintiff had clearly the right to give the excluded evidence.

It should be remembered that the period in question was very near the ordinary close of navigation; that it might very readily be assumed that, if this contract had been abandoned, the Plaintiff could have secured no other cargo; that he could have taken this to New York, as indeed the result in this case pretty clearly demonstrates, and the consequence, therefore, would have been that he would have lost his entire freight in New York. The rule then, I think, is that, while the Plaintiff was at liberty to rescind the contract, he was not bound to do so on default of the Defendants, but that it was his right and privilege to go on, and undertake the performance as diligently and faithfully as was possible, and, thus doing, he was not limited to the rule of damages to which the Court, by its ruling on the trial, confined him, but was entitled to recover

all the damages which, by the default of the Defendants, he naturally and necessarily sustained.

That the special circumstances under which the contract in question was made having a bearing not only upon its interpretation, but upon the rights of the parties under it, I think is very clear upon authority. Thus in Hadley *v.* Baxendale (9 Exch. 354; 26 Eng. L. and Eq. 398), the rule is thus stated by Baron Alderson: "If the special circumstances under which the contract was made were communicated by the Plaintiff to the Defendant, and thus known to both parties, the damages resulting from the breach of such a contract, and which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances to known and communicated."

So, where goods are purchased for a particular market, and that known to both parties, the damages are governed by the price in that market (Hargous *v.* Ablon, 5 Hill, 472); and the general rule, long recognized in the Courts of this State, and applied in numerous cases, is, that a party injured by the breach of a contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. (See Griffin *v.* Colver, 16 N. Y. 489.)

Let us suppose this case had been reversed, and the Defendants had brought an action against the Plaintiff, claiming damages for his failure to deliver the cargo in New York before the close of navigation, in the fall of the year. Can there be a doubt that the Plaintiff would have been entitled to show the fact that he was detained by the neglect and default of the Defendants, and in violation of their agreement to load him in season to enable him to accomplish the voyage, and thus not only defeat the alleged claim of the Defendants, but prove affirmatively the facts which entitled him to claim what he had lost by such default? And if so, the right to recover these damages, by a suit instituted directly, therefore, seems to me equally clear.

It is within the principle established in Stewart *v.* Keteltas

(36 N. Y. 388), that hindrances by one party to a contract, whereby the other is prevented from completing his part of the contract by the time stipulated, afford a legal excuse for non-performance within such period; and not only this, but, as it seems to me, affords the party thus hindered the right to redress for any damages he may have suffered by reason of such hindrance, delay, or default. Thus, in the case cited, Stewart & Howell were not only not bound to abandon their contract on the failure of Keteltas to perform seasonably on his part, but were admitted to go on, and claimed and recovered their full compensation, although the work was not completed until long after the stipulated time. And the right to recover damages seems to me to stand upon the same substantial ground of principle.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Reversed.

JOEL TIFFANY,
State Reporter.

JAMES W. VAN ALSTYNE ET AL., RESPONDENTS, v. THE NATIONAL COMMERCIAL BANK OF ALBANY, APPELLANTS.

Bill of Exchange—Forged endorsement—Failure to produce.

The Plaintiffs procured from the Defendants in Albany a draft drawn by the latter on a bank in New York, payable to the order of the Plaintiffs' agents then in West Virginia, and sent such draft to him to enable him to raise money there for the benefit of the Plaintiffs, such agent having no interest in the draft, and the draft was there received for deposit for safe-keeping by another who forged the endorsement of the payee, and through such forged endorsement negotiated it to a bank there and absconded with the money, of all which due notice was given to both drawers and drawees, and the Plaintiffs demanded payment from the drawees, and gave due notice of non-payment.

The Virginia bank, claiming to have acquired title, forwarded the draft to New York, and caused it to be presented to the drawees and protested for non-payment, and refuse to give up the draft to the Plaintiffs, who have received from the payee (their agent) a formal assignment of the draft.

Held—That these facts do not entitle the Plaintffs to maintain an action either at law or in equity against the drawers without the production of the draft, although there was no want of diligence in making demand of the drawees, so far as such demand can be made without such production, and notwithstanding the drawees still held the funds of the drawers, and are solvent, and ready to pay them to such drawers.

The allegation and proof in such action against the drawers that the negotiation of the draft was by a forged endorsement, and that the present holders, who claim title thereto and a right to recover thereon, are *out of the jurisdiction of this Court, in another State,* do not warrant the Plaintiffs to proceed upon such draft as a *lost draft,* either under our statute or in a Court of Equity, and recover on giving a bond of indemnity to save the Defendants harmless against any claim by virtue of such draft.

The Plaintiffs cannot in this manner cast upon the drawers the burden and hazard, in any future action by the holders of the draft, that such

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Banks—Recovery by depository on outstanding certificate of deposit. 136 *N. Y.* 460 (49 *St. Rep.* 680).

Banks—Principal creditors—Insolvency—Demand. 23 *Misc.* 209 (51 *N. Y. Supp.* 1118).

Promissory note—Failure to produce endorsement. 1 *Hun,* 559 (4 *T. & C.* 80); 59 *Hun,* 481 37 *St. Rep.* 424; (13 *N. Y. Supp.* 455); 6 *Hun,* 127.

endorsement by the payee was a forgery, or the risk that the holders may show either that it was genuine or made under such circumstances as will conclude the payee, or that the circumstances attending the negotiation were such as to entitle them to retain and collect the draft.

This burden and hazard rests upon the Plaintiffs, and the fact that such draft is held in another State makes no difference.

APPEAL from a judgment of the General Term of the Supreme Court in the Third District, affirming a judgment for the Plaintiff entered upon the decision of the Referee.

The action is brought to recover from the Defendants the amount of a draft or check drawn by them at Albany upon the National Bank of Commerce in the city of New York, payable to the order of J. H. Abbott, for the sum of five thousand two hundred and eleven dollars, without producing the draft, and while the draft is in the possession of the Second National Bank of Parkersburg, in West Virginia, which bank claims to be the lawful holders and owners thereof, and refuses to deliver the same to the Plaintiff, and is not a party to the present action.

The facts material to the question decided by the Court are these:—

On or about the 4th of March, 1865, the Plaintiffs purchased the drafts from the Defendants for their own account, paid therefor, and received the same from the Defendants. They then sent the draft to the said Parkersburg, in West Virginia, duly enclosed and addressed to J. H. Abbott, the payee therein named.

Said payee had no interest therein, but his name was inserted as payee at the request of the Plaintiffs, and for their convenience in the use of funds which were expected to be obtained thereon. When the draft reached Parkersburg, J. H. Abbott, the payee, was temporarily absent, and in expectation of its arrival had intrusted his brother, H. C. Abbott, to deposit it in the North-Western Bank for safe-keeping.

H. C. Abbott received the draft, and, as found by the Referee, upon the proof on the trial herein, forged the name of his brother, the payee, on the back of the draft, obtained the

money thereon from the Second National Bank of Parkersburg, to whom he delivered the draft, and fled the country to parts unknown. J. H. Abbott, on the 11th day of August, 1865, assigned to the Plaintiffs all his right, title, &c., in or to the draft.

The Plaintiffs have demanded payment of the draft from the drawees, giving them notice of the foregoing facts. They have also given notice to the Defendants of such facts, and of the refusal of the drawees to pay without the presentation of the original draft, and in all these respects the Plaintiffs have used due diligence.

The Defendants had, and have at all times had, in the hands of the drawees funds sufficient for the payment of the draft; and the drawees are, and at all times have been, solvent, and able to pay to the Defendants all the funds of the Defendants in the hands of such drawees.

The complaint of the Plaintiffs treats the draft, by reason of the facts stated, as a lost draft, and alleged a tender to the Defendants of a bond of indemnity, and offered to give the Defendants a good and sufficient bond of indemnity to save them harmless of and from all other payments, costs, &c.

The answer of the Defendants, among other things, alleged the possession of the draft by the Parkersburg Bank, claiming to be the lawful owners and holders thereof for value, and that such bank has notified the Defendants of such claim, and not to issue a duplicate thereof, nor pay the same to any other person.

The Defendants declare that they had, and have always had, funds sufficient for the payment of the draft in the hands of the drawees, and that the drawees are ready and willing to pay it under proper presentation. They also deny that the draft is lost, and by denials put in issue the Plaintiffs' title.

Upon the facts in substance above stated, the Referee decided that the Plaintiffs were entitled to recover in this action upon executing and delivering to the Defendants a bond with two sureties, in a penalty at least double the amount of the

draft, to be approved by the Court, conditioned to indemnify the Defendants against all claims by any person on account of the draft, and all costs, &c.

Such bond being executed and approved, judgment was ordered for the Plaintiffs for the amount of the draft, $5,-813.87, and costs $319.53, which judgment being affirmed in General Term, the Defendants appealed to this Court.

Samuel Hand for Appellants.
Lyman Tremain for Respondents.

WOODRUFF, J.—The Plaintiffs, upon the facts alleged and proved on this trial, are equitable owners of the bill of exchange in question. If in truth no title has been acquired by the Parkersburg Bank by the negotiation thereof to them, the Plaintiffs are entitled to the possession of the bill.

The question which alone it is necessary to consider, if I am correct in my conclusion upon the question, is, can a party, either as legal or equitable owner of a bill of exchange, demand payment from the drawee, and on refusal charge the drawer, and recover the amount thereof from him without producing the bill, on showing that the bill is in another State, in the possession of one who is not a party to the suit, who has paid full value therefor, who claims title thereto, and a right to recover thereon, but to whom the bill was negotiated by a forged endorsement?

The familiar rule of commercial law, that in order to charge the drawer the bill must be presented to the drawee, and in order to recover from the drawer the bill must be produced, is not and cannot successfully be contradicted: and that this suit is qualified by an exception in the case of lost bills is not denied.

It is not material to inquire whether a recovery by the Plaintiffs, if they are entitled to recover upon the facts stated, shall be deemed warranted by our statute authorizing a recovery in a suit founded upon a bill lost while belonging to the party claiming, or must be founded upon the jurisdiction and power

of a Court of Equity to allow such recovery in a case equitably entitling the party thereto. Our Courts are now Courts of Law and Equity In actions in our Courts the party may have any relief, legal or equitable, to which, upon the facts alleged and proved, he is entitled.

It is, however, pertinent to observe, that the statute in terms gives a recovery only where the bill is lost while belonging to the party claiming.

This was within the jurisdiction and power of Courts of Equity before the statute. The statute, therefore, did not enlarge the jurisdiction of the Court; it simply declared the party in such case entitled to recover in a suit founded on the bill.

If the bill is lost, within the meaning of that statute, it was "lost" in contemplation of a Court of Equity. If it was not a "lost" bill within the statute, but is nevertheless so situated that, in the judgment of a Court of Equity, it should be treated as in like condition, then the claim to recover is made in a jurisdiction competent to give relief. An illustration of the case last supposed is found in that of a bill in course of transmission by a vessel which was captured and carried into a port of the enemy while at war. (6 Ves. Jr., 811.)

Again, it must, for the purpose of the inquiry, be assumed, as in part found by the Referee, that the Plaintiffs have used due diligence in notifying the drawer and drawee of the facts claimed by them in regard to the actual situation of the bill, and that in respect to demand of payment and notice of non-payment they have done all which, without the production of the bill itself, they could reasonably be required to do.

These suggestions bring us to the inquiry above stated, and enable us to present it first in a form much more simple.

Can a recovery of the amount of a bill of exchange be had in a suit against a party thereto, by the legal or equitable owners, without its production, on proof that another person has the possession thereof, claiming title, which title the Plaintiffs are ready to disprove?

An affirmation of this question declares that, upon mere proof of a wrongful holding or detainer of a bill by a third person, not a party to the suit, the acceptor or drawer may be subjected to the hazard of proving such holding by the third person to be wrongful in any future claim which may be made upon him—in other words, such acceptor or drawer may be required to settle the Plaintiff's dispute with an alleged wrongdoer.

No case has been called to our attention in which a recovery has been allowed in such case, and no treatise upon bills of exchange, lost or not lost, states any such proposition. This is not conclusive, perhaps, but it is some evidence that, while controversies respecting the right of recovery upon lost bills have been numerous, no one has supposed that the wrongful detention of the bill by a third person entitled an alleged owner to recover without its production.

The very object of the rule itself which requires such production is that the party paying may have in his possession the voucher and proof of his payment to a person entitled to payment, and an assurance or guaranty that he shall not be vexed by a claim of another thereon; and the rule is not to be dispensed with in the face of the avowed fact that such other person holds the bill and makes such claim. Indeed, I cannot suppose that a right of recovery would for a moment be claimed without the further fact that the adverse holder of the bill resided in another State.

What should be the influence of that fact? In considering that question the same observation just suggested is equally patent, viz., that no case or authority is found which affirms the right to recover at law or in equity, on the facts stated.

It is proper to bear in mind that the bill which is claimed to be wrongfully withheld from the plaintiff is not in a country at war with us, to which our citizen cannot resort for the recovery of the bill or its value, and from which the holder cannot come to our courts and prosecute the parties; and it is further proper to suggest—and a Court of Equity in this State

should not close its eyes to the fact—that the bill is held in a State where not only the general principles of right and wrong are recognized and enforced, but where the general rules and principles of the law and the maxims of equity prevail as they do with us, and where remedies may be pursued, rights enforced, and wrong redressed, in modes conforming to the ordinary pursuit of justice and equity.

Of so much, at least, the Court must take notice, as presumptively furnishing to the Plaintiffs an opportunity to assert and maintain their rights against the holders of the bill, and, if they have no title, to obtain complete redress.

In the present case not only this is true, but the bill is in a State where judicial tribunals exist by the Federal laws which are common to the several States, proceeding upon like principles, legal and equitable, there and here, and to which the Plaintiffs may resort.

It is, therefore, unnecessary to consider the case of a bill which, through misadventure or by wrong, has come to the possession of a savage in a remote or inaccessible country, where in every reasonable estimate of its situation it must be declared lost.

The bill was sent voluntarily by the Plaintiffs to Parkersburgh. The facts found import that it was their intention that it should be negotiated there. It was negotiated there, thought wrongfully, fraudulently, and by a crime, according to the result of their ex-parte investigation of the claims of the Parkersburgh Bank.

It is quite apparent, however, that there may exist grounds for their claim which the present trial has not disclosed. That Bank may have evidence of the authority of H. C. Abbott to negotiate the draft for which, in perfect good faith, they have paid value; they may show that no forgery has been committed, and they may show facts which would estop J. H. Abbott to deny his authority; they may, if they cannot show a legal title, possibly show an equitable one.

It is true that if this action can be maintained without the

production of the draft, we are to take the facts to be as established by the proofs on this trial.

But the suggestions thus made are nevertheless pertinent to the inquiry, whether the adverse holding by the Parkersburgh Bank creates an exception to the general rule, requiring its production in order to a recovery from the drawer.

I am clear in my own opinion, that the fact that the holder resides in another state makes no difference in this respect.

The practical effect of recognizing an exception founded on that circumstance is very important, and the inconvenience and hardships to parties to negotiable paper furnish a strong reason why a Court of Equity should give no countenance to it.

Let it be understood, as I am sure it has never before been understood, that whenever a controversy arises with the holder of negotiable paper residing out of the State, the claimant may sue the parties thereto here and recover, assigning that excuse for not producing and surrendering it to the drawer, acceptor, or maker, and no party to such paper will be safe. An entirely new ground for invoking equitable interposition and relief will, I think, be introduced into the law, and injustice and wrong to innocent parties to the paper will be done under color of doing equity to a claimant.. For it must be remembered that the indemnity which the Court prescribes as the condition of compelling payment is at best a precarious reliance.

In the ordinary fluctuations which occur in the mercantile community, for whom the rules of law and equity which we are considering are especially designed, such indemnity is liable to be utterly worthless when the party has need to look to it for protection.

If recovery is to be had in a case like the present, it can only be placed on the ground that the adverse claimant and holder is in another State.

The fact that the latter is impeached by proof of forgery cannot make any difference. That is not material to the principle involved. It would present the same question if the allegation were that possession of the bill was procured by fraud,

so far as the analogy to a lost bill is relied upon; for the question in the Court of Equity is, first of all, is there a sufficient excuse for not producing the bill? and to answer that question the particular facts which make an alleged detention wrongful are not material.

If its being wrongfully detained by a party out of the State be an excuse, then, whether the wrong-doer claims through an alleged forged endorsement, or through a fraudulent procurement of possession, or even by a breach of a contract, to retain the bill which came rightly to his possession, can make no difference.

True, if he claims by a forged endorsement of the name of the payee, if he can never recover from any of the parties; but that is not the ground of jurisdiction. If it were, and without that the Court would not grant relief, it is absurd to require indemnity to the Defendant against his claim, for he has none which he can maintain.

That this is so will be readily seen, if the case where the alleged wrongful holder lived within this State be again adverted to. In such case, although a holding by a forged endorsement was alleged, the owner would be compelled to proceed against him was already shown, and he could not proceed as upon a lost bill. It is the non-residence alone which creates any distinction, and therefore the nature or ground of the wrongful detention is not material to the question. It would therefore follow, that if the owner of negotiable notes saw fit to take them to New Jersey, or over the line into any of our adjoining States, and alleged that he was there defrauded of the possession, or borrowed money thereon, and claimed that he had paid the loan, but the holder refused to return them, or even offered them at any of the many banks in our vicinity for discount, and alleged that they kept the notes without making such discount: in all these cases, so far as the question is whether a note is lost, or in a situation in which it should be so regarded in a Court of Equity, because it is in another State, in the hands of a third person having no title,

the rule must be the same as where the Plaintiff's allegation is that possession was obtained through a forged endorsement.

The true ground upon which a party is allowed in equity to require the payment of a lost bill, or a bill taken by the enemy in time of war, on giving indemnity, is that he has no other recourse. He is ready to do, and is required to do, all that he can. It is inequitable that, doing this, he should lose his money. The Court cannot equitably require him to do what the general rule requires; it is unreasonable so to require, because it is not possible that he should do it, and hence it will be seen by examination of the case that very satisfactory proof of the essential fact of loss of the bill is uniformly required.

The fact that the bill is out of the jurisdiction shows no such case. The fact has relevancy to the question of convenience in pressing his remedy for regaining the possession, by establishing his title as against the alleged wrong-doer, but it raises a question of convenience only.

In my judgment the claim made in this case is not only without precedent, but its recognition would be fraught with mischief, and would introduce into the law a rule dangerous in the extreme.

The judgment should be reversed.

JOEL TIFFANY,
State Reporter.

SAMUEL PINDAR, ASSIGNEE, ETC., RESPONDENT, *v.* THE CONTINENTAL INSURANCE COMPANY, APPELLANT.

THE SAME, RESPONDENT, *v.* THE RESOLUTE FIRE INSURANCE COMPANY, APPELLANT.

Policy of Insurance—Classification of risks.

The terms in a policy of insurance, *"hazardous," extra hazardous, specially hazardous,* and not *hazardous,* are well-understood technical terms in the business of insurance, and refer to distinct classes or degrees of hazards. *Extra hazardous* and *specially hazardous* are not classifications of goods under the more general term *"hazardous,"* and are not to be confounded one with the other.

H. A. Nelson for the Respondent.
J. Thompson for the Appellant.

WOODRUFF, J.—The Court below erred in their construction of the meaning of the terms "hazardous" and "not hazardous" (in the description of the goods insured) in the body of the policy, and in holding that "hazardous," as there used, included all *kinds* of *hazardous* goods; that it was used in a *general sense,* as contra-distinguished from "not hazardous," and, therefore, that there was actual permission in the very body of the policy to keep goods "extra-hazardous" and "specially hazardous."

Upon this construction the nonsuit was denied, and upon this construction the General Term ordered judgment for the Plaintiff.

This was erroneous. The terms "hazardous," "extra-hazardous," "specially hazardous," and "not hazardous" are well-understood technical terms in the business of insurance, having a distinct separate meaning. Although what goods are included in each designation may not be so known as to dispense with actual proof, the terms themselves are distinct,

Insurance—Policy—Description. 47 *N. Y.* 116.

Insurance—Classification of risks. 47 *N. Y.* 602; 54 *N. Y.* 259.

and known to be so; so that an insurance upon goods "hazardous" does not include goods "extra-hazardous" or "specially hazardous," and an insurance on goods "extra-hazardous" does not include goods "specially hazardous." "Extra-hazardous" and "specially hazardous" are not subdivisions or classifications of goods under the more general term "hazardous," but distinct classes of goods, and no more to be confounded with, nor to be held embraced in that term, than "hazardous No. 1" is to be held to embrace goods "hazardous No. 2," and so on. In the case before use, the policy and its schedules, which are to be read in connection therewith, classify goods with express reference to, and in conformity with, these views, and these are the only guide to the construction of a contract which is not ambiguous. Thus, they divide goods into classes:—

"Not hazardous,"—giving an enumeration or description of goods in this class.

"Hazardous, Nos. 1 and 2,"—embracing many particulars.

"Extra-hazardous, Nos. 1, 2, and 3,"—each embracing various gods of different descriptions.

"Specially hazardous,"—enumerating articles.

Now, with this specification of the declared character of the various kinds and descriptions of goods, trades, etc., the parties agree to an insurance. And what was insured? The policy in most explicit terms answers, "good hazardous" and "not hazardous," and by the plainest implication, excludes all others. These terms cannot, in the ordinary technical language of insurance, include any other. And all room for inquiry or proof as to their meaning is further and more precisely excluded by the fact that the express definitions which form a part of the policy (the schedules) point out in clear terms their meaning. Both are defined in terms.

It follows that the condition in the body of the policy, by which it was declared that the policy should be void and of no force or effect if any articles, goods, or merchandise "extra-hazardous," or "specially hazardous," in the second class of

hazards annexed, are kept, etc., "except as herein specially provided for," was left to its full operation,—unaffected by the fact that goods "hazardous" and "not hazardous" were insured; and the keeping of turpentine in the store (it being "extra-hazardous") was fatal, and forbade any recovery. The claim that Plaintiff might prove that turpentine is usually kept in a country store, and so explain or enlarge the meaning of the policy, is wholly inadmissible. The contract is specific. The Defendant had a right to make it so. Both consented to it. The case is not like those in which a trade or business is insured, which, by implication, includes all the usual incidents to the carrying it on,—*e. g.*, a printing-house, a candle-factory, or even the stock of a country store. In such cases, what usually constitutes such stock, or the materials used in the trade or factory, is open to proof. Not so here. The insurance is on goods described as "hazardous" and "not hazardous." This is made definite by the reference to the schedules and the classification therein, and cannot be changed by any such proof. If the insured wished to keep turpentine for sale, he should have obtained a special provision therefor, as he did in regard to gunpowder ("privileged to keep gunpowder"), etc.

The judgment must be reversed.

All the Judges concurring, except MASON. J.

Judgment reversed.

JOEL TIFFANY,
State Reporter.

GEORGE P. BRADFORD AND OTHERS, APPELLANTS, v. LYDIA FOX, EXECUTRIX OF EDWARD FOX, DECEASED, RESPONDENT.

Account—Delivery of check in payment.

The delivery of a check for the amount of an account presented for payment is not to be deemed payment of such account, unless the check is paid on presentation to the proper bank.

ACTION to recover an account for goods sold by Plaintiff to Defendant's testator. Defence, payment of the account: Trial at Circuit without a jury.

The following facts appeared: That the goods were sold and delivered by the Plaintiffs to the Defendant in June, 1856; that in April, 1857, the account not having been paid, it was placed by the Plaintiffs in the hands of their attorney for collection, who wrote to the testator requesting payment. On the 7th of April the testator, by messenger sent his check, payable to the Plaintiffs, upon the Island City Bank for the amount. Upon presentation of the check to the Plaintiffs by the messenger, the Plaintiffs informed the messenger that the account was in the hands of their attorney, with whom

Payment—Precedent debt—Taking note. 43 *N. Y.* 173; 57 *N. Y.* 641; 74 *N. Y.* 595; 4 *Hun,* 639; 24 *Hun,* 242; 38 *Hun,* 386; 53 *App. Div.* 487 (65 *N. Y. Supp.* 1050); *D.* 81 *App. Div.* 523 (81 *N. Y. Supp.* 410); 17 *Misc.* 384 (39 *N. Y. Supp.* 1063); 30 *Misc.* 822 (61 *N. Y. Supp.* 919); 1 *Abb. N. C.* 49; 67 *Barb.* 329; 3 *Lans.* 337; 7 *Lans.* 375. 57 *Super Ct.* 107 (25 *St. Rep.* 356; 5 *N. Y. Supp.* 572); 35 *St. Rep.* 174 (12 *N. Y. Supp.* 433); 2 *City Ct.* 217.

Bills and notes—Delay in presentment for payment. 16 *Misc.* 318 (39 *N. Y. Supp.* 396; 25 *Civ. Proc.* 406); 32 *St. Rep.* 953 (10 *N. Y. Supp.* 875).

Note—Taking as payment—Surrender on trial. 22 *Hun,* 487; 38 *Super. Ct.* 195.

it must be settled. The messenger thereupon took the check to the attorney, who received the same, and gave a receipt therefor per account rendered, and forwarded the check to the Plaintiffs at about four o'clock, who, upon the next day, sent the same by their clerk to the bank to get it certified. The clerk delivered the same to a clerk in the bank, with a request to certify the same. The clerk, after conferring with the receiving teller, returned the check without certifying it to the Plaintiff's clerk, who returned the same to plaintiffs, who on same day sent it to their attorney, who upon same day notified Defendant that the check had been dishonored, and thereupon commenced this action.

There was no conflict in the evidence It was proved that the testator had sufficient funds in the bank to pay the check. The Judge found the above facts in substance, and thereupon dismissed the complaint with costs. After affirmance of the judgment by the General Term of the Supreme Court, the Plaintiffs appealed to this court.

J. E. Burrill for the Appellants.
Cram & Robinson for the Respondents.

GROVER, J.—The delivery of the check did not operate as payment of the previous debt. (Hill *v.* Beebee, 13 N. Y. 566.) The receipt given by the plaintiffs' attorney therefor, although it did not refer to the check, but acknowledges the receipt of seventy-five dollars as per account rendered, added nothing to the effect of a mere delivery of the check to them. They were mere attorneys to collect the demand, and as such had no authority to receive anything but money as payment. This was known to the testator's agent at the time he delivered the check to them. The receipt, although primâ facie importing the receipt of money, was subject to explanation by parol proof, and the Defendant himself proved that no money was paid, but the check only delivered. The receipt contained no evidence tending to show that the check was received by the attorneys in satisfaction of the amount, unless such agreement

is to be inferred from the fact that it imported that it was used as cash.

As above remarked, the attorneys had no power to receive the note or check of the debtor, or anything else in satisfaction except money. The debt not having been paid by the delivery of the check, it only remains to inquire whether that was effected by any subsequent act or omission of the Plaintiffs or their attorneys. The check was received by the attorneys about four o'clock; upon the same day they forwarded it to the Plaintiffs; they had the unquestioned right at once to return it to the testator and sue for their debt. Instead of this they sent it the next day to the bank, to procure a certificate of its goodness. This the bank, without any explanation, refused to do, thus creating a stronge inference that the check was worthless. The Plaintiffs upon the same day returned the check to the attorneys, who gave the testator notice that it had been dishonored. This was the strongest kind of notice to the Defendant that the Plaintiffs would not accept the check as payment of the debt. There was no unreasonable delay in giving this notice. Upon what ground can it be said that the amount was paid? It is said in the prevailing opinion in the Supreme Court, that requesting the bank to certify the check was not a demand of payment or its equivalent; that the bank was under no legal obligation to certify the check. All this may be conceded, and yet it fails to show payment of the Plaintiffs' debt by the check. The Plaintiffs, without doing anything with the check, had the right to at once notify the testator that they would not receive it as payment, and thereafter held the check subject to his order. If they omitted this notice, and retained this check until the failure of the drawer, thereby causing a loss of the money, the case would have been different. Such loss would have been thrown upon the Plaintiffs, and to avoid circuity of action they would have been held to have made the check their own, and their debt against the drawer paid. But no such result followed in the present case, for the reason that notice of non-acceptance of the check as

payment was promptly given, and for the further reason that there was no pretence of the failure of the drawer. The Supreme Court relied upon the authorities showing that, in an action by the holder of a check against the drawer, where laches in demanding payment or in giving notice of dishonor was averred, the onus of proving that no damages had accrued was upon the holder. But those cases have no application to the present. Here the action is for the collection of the pre-existing debt, and the onus of proving payment was upon the Defendant. To effect this, proof of the delivery to and receipt of the check by the Plaintiffs not being sufficient, the Defendant was bound to go further and show that by the laches of the Plaintiffs a loss had been incurred, to be borne by some one, and when this appeared the law would cast the loss upon the Plaintiffs, and would work out such result by making the check operate as paymetnt of the debt. Retaining the check after giving notice did not affect the question. It was held subject to the order of the Defendant; surrendering it upon the trial was sufficient. (Nichols v. Michael, 23, N Y. 267).

The judgment must be reversed and a new trial ordered, costs to abide event.

Judgment reversed.

JOEL TIFFANY,
State Reporter.

ELEANOR THURSTON, RESPONDENT, v. HENRY S. CORNELL, APPELLANT.

Usury—Payment of extra per cent. for services is not.

It is not usurious for a party loaning money to contract that a certain per cent. beyond lawful interest shall be charged for time, service, and expenses spent, performed, and incurred in procuring the money for the accommodation of the Defendant.

The Defendant applied to Plaintiff to loan a sum of money; Plaintiff objected, because she had not on hand the amount desired. Defendant urged his necessities, and agreed to pay five per cent, as compensation for services, &c., if she would procure him the money, &c., in addition to lawful interest. *Held,* not to be usurious.

THIS is an action against principal and sureties, on a promissory note for $412 and interest, payable in one year, made to the Plaintiff for money loaned. The defence was usury. The evidence bearing upon the negotiation between the parties was conflicting; the Defendant, Cornell, who obtained the loan, testifying that it was at first expressly agreed that he should pay ten per cent. for the money, and that the rate was subsequently augmented to about thirteen per cent.; while the Plaintiff testified that the sum reserved by her out of the amount indicated by the force of the note, viz., the sum of $21.50, was reserved as compensation for her services and expenses in collecting the money necessary to complete the amount to be loaned, and that such services were rendered at the request of Cornell, and upon his express promise to pay her therefor.

The evidence being closed, the Defendant's counsel requested the Court to direct a verdict for the Defendant, on the ground that, as a matter of law and on the Plaintiff's own evidence,

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Conflicting evidence—Intent. 43 *N. Y.* 236; 50 *N. Y.* 443; 81 *N. Y.* 371; 160 *N. Y.* 274, 275; 13 *Hun,* 538; 22 *Hun,* 223; 11 *App. Div.* 442 (42 *N. Y. Supp.* 323); *D.* 11 *App. Div.* 445 (42 *N. Y. Supp.* 325); 51 *Barb.* 557; 5 *Lans.* 540; 20 *St. Rep.* 836 (3 *N. Y. Supp.* 390); 75 *N. Y. Supp.* 383.

Usury—What constitutes. 69 *N. Y.* 342; 87 *N. Y.* 55; 12 *Hun,* 390; 1 *City Ct.* 3.

the defence of usury had been made out, which the Court declined to do, and the Defendant excepted. The Court charged the jury that, if the excess over seven per cent. was taken exclusively for expenditures of time, services, and money, in obtaining the money to be loaned to the Defendant, without any intention to evade the statute against usury, and if the amount thus taken was not more than a reasonable charge for such expenditures, and if they were made at Cornell's request, and on his promise to pay therefor, then the note was not usurious. To which charge the Defendant excepted.

The Defendant requested the Court to charge the jury that it was usury for the Plaintiff to take even her actual expenses in collecting her own money to loan to Defendant, when those expenses brought the sum paid for the loan to more than seven per cent.; also, that it was ursury for the Plaintiff to take anything more than her actual expenses as a personal compensation for collecting the money; also, that if the extra money paid was, in the mind of the Plaintiff, an inducement to make the loan, it was usury. Each of which requests was refused by the Court, and the Defendant excepted.

The Plaintiff was permitted, under objection of Defendant, to testify for what she was to receive the five per cent. above interest; also, what was the state of her health at the time of the transaction, how long she had been sick, and what was her disease; also, whether the money which she raised to loan to Cornell was previously in safe hands, and what her intention was in stipulating for the sum reserved out of the face of the note.

The jury found a verdict for the Plaintiff for the full amount of the note, with interest. A motion for a new trial was made by Defendant at Special Term, and denied. The order denying such motion was affirmed at General Term, and Defendant appeals to this Court.

S. Hand for the Appellant.

Hancock & Parker for the Respondent.

DWIGHT, J.—The act forbidden by the statute as usury,

and which vitiates all contracts into which it enters, is defined to be the reserving or taking of any greater sum or value than seven per cent. for the loan or forbearance of money. The rule is simple: its application, depending, as it does, upon the facts of each particular case, is sometimes involved in difficulty.

In this case, there being a direct conflict between the evidence of the Plaintiff and that of the Defendant, Cornell, upon the material facts, and the jury having found in favor of the former, the facts must be taken to be as testified to by her. We have, then, in brief, the following case presented: The Defendant, Cornell, a stranger to the Plaintiff, procures himself to be introduced to her; finds her sick in bed; and proposes to borrow $400, offering satisfactory security; the Plaintiff has but about half the desired amount on hand, and when it is suggested that she has money due her in a neighboring village, she admits that she has, but says it is in good and safe hands, and that she does not wish to change it; the Defendant urges his pressing necessities, appeals to her to save him from the loss of his property, which he says must ensue if he does not obtain the loan, and offers to compensate her for her trouble and expense if she will go to Waverley and collect in this money in order to loan it to him. She hesitates to undertake the task on account of her ill health, but finally consents to make the effort for five per cent. on the amount. She goes to Waverley three times, hiring a conveyance each time; sends a messenger twice; collects money from four different persons; is compelled to resort to borrowing to make up the full amount, and to apply to several persons before obtaining the loan; and then finally completed the amount to be loaned to Cornell.

Her health having been injuriously affected by the travel and exertion involved in the business, which was more than she anticipated when she undertook it, she calls Cornell's attention to that fact, and suggests she ought to have increased compensation. Cornell admits the justice of the claim, and consents to increase the compensation to six per cent. The

money is paid him, less the compensation agreed upon ($21.50), and the note is taken for the full amount, with interest.

The Plaintiff testifies, under objection, that her intention in stipulating for this sum reserved was to get compensation for her trouble and expenses in running about and collecting and borrowing the money, and that she did not take it for the use or forbearance of the money loaned.

The Court was asked, upon this evidence, to direct a verdict for the Defendant, on the ground that, as matter of law, the defence of usury was established, and the question is fairly presented by the refusal of the Court so to direct a verdict, as also by the charge of the Court, and the several refusals to charge, whether the lender of money may lawfully receive from the borrower a reasonable compensation, in excess of interest, for services and expenditures in procuring the money to be loaned, provided the services were performed and the expenditures incurred at the request of the borrower, and upon his express promise to pay therefor.

Upon this question there can be no doubt. The compensation thus received is distinct from that agreed to be paid for the loan or forbearance of the money. The latter is interest, and cannot lawfully exceed seven per cent.; the former is a stipulated price for work, labor, and services done and performed, and for money paid, laid out, and expended. As such it constitutes a distinct demand, which might be recovered in a separate action if not included in the security taken for the principal debt. Indeed, in this case, there is no doubt, it might have been recovered in an action on the agreement, if the principal debt had not been increased; as if, for any reason, the Defendant had declined to accept the loan after the money had been raised for him by the Plaintiff.

In Harger *v.* McCullough (2 Denio, 119) a creditor had made a journey at the request of the debtor, and upon his promise to pay for the trouble and expense. For the purpose of effecting a settlement of the claim, a bill of exchange was taken in liquidation of the demand, in which was included,

besides the amount of the debt, the sum agreed upon for the expenses of the creditor's journey. The defence of usury was interposed to an action on the bill. The Court, by BRONSON, Ch.J., said: "There was no usury. It (the sum added to the amount of the debt) was so much money paid, laid out, and expended as the original demand. It might have been re-expended for the Defendant, upon request, and was as much a debt as the original demand. It might have been recovered had no arrangement in relation to the original debt been made." The fact that an arrangement, ostensibly like that in the present case, is often resorted to as a device to cover the exaction of usury, is no objection to the principle here announced. It is always a question for the jury, whether the agreement was a lawful or an usurious one. It is a well-known practice of money-lenders to attempt to cover usurious transactions by selling property of nominal value to the borrower, and including a substantial price therefor in the security taken for the loan. The device fails, where it is seen to be such, but no one questions that the price of property sold in good faith may be included in the same security with money loaned.

It is simply a question for the jury whether the sale was bonâ fide, and the price agreed upon was the actual value of the property, or whether the transaction was a mere device for obtaining usurious interest. (Rose v. Dickson, 7 Johns. 196.) And the fact that the price of the property was large, and more than it might have been obtained for, does not necessarily condemn the transaction as usurious. The question is as to the intent of the parties. (Sizer v. Miller, 1 Hill, 227.) And this might be true cause if the sale of the property was insisted upon as a condition of making the loan. In the numerous cases where the owners of real estate in growing communities cut it up into lots, and offer to purchasers to loan them money to be expended in improvements, the sale of the lots is a condition of the loan; but even though the price thus obtained for the property is larger than it would have brought but for the loan accompanying it, yet, if the transaction be in

good faith what is here described, it would be absurd to pronounce it usurious.

So, too, the hiring of services may be made the condition of a loan of money. As where a clerk or salesman, having some capital and seeking employment, makes it a condition of loaning his money that he shall be employed at certain wages. The contract would not be usurious unless it should be found that the price put upon the services was, in fact, intended as a cover for obtaining unlawful interest for the money loaned.

In all these cases we arrive at one result, viz., that the character of the transaction depends upon the intention of the parties, and that is a question for the jury. The rule applies to the case at bar, and the instruction given to the jury was strictly correct. The same reasoning also disposes of all the Defendant's exceptions to the several refusals of the Court to charge as requested. The only one of these exceptions which it can be necessary to notice further is that to the refusal of the Court to charge, "that if the extra money paid was, in the mind of the Plaintiff, an inducement to make the loan, it was usury." This might seem at first sight to be substantially equivalent to the proper item, that if the extra money was received by the Plaintiff in any manner as compensation for the loan, then it was usury. The latter is a correct proposition, and it was in substance charged by the Court. But the proposition, contained in the request to charge was a different one.

According to the testimony of the Plaintiff, which the jury seem to have believed, the extra money paid was in one sense an inducement to make the loan, and yet was not received, in any measure, as compensation for the use of the money. It was an inducement to make the loan, in that it induced the Plaintiff to incur the extra trouble and expense without which the loan could not have been made. But in this view, it was distinct from the compensation for the loan itself, and hence was not usury. This request to charge was, therefore, properly refused.

I do not think there was any error in the rulings of the Court in the admission of evidence. The subject of the Plaintiff's state of health, and of the effect upon it of her travel, and trouble in collecting the money to be loaned, entered into the negotiations between herself and Cornell in fixing the amount of compensation to be allowed her for her services, and so far it was a part of the res gestae. She had a right to show, upon the trial, that her representations to Cornell in that respect were true, and that they were made in good faith, and not as a cover for enhancing the compensation to be allowed her for the use of her money. The same may be said of the admission of the Plaintiff's evidence that her money was already in safe hands. She had so represented the fact to Cornell as a reason why she should not undertake the task of collecting it for his accommodation, and her evidence that such was the fact bore upon the good faith of the transaction.

The only remaining question arises upon the admission of the Plaintiff's evidence as to what her intention was in stipulating for the extra compensation reserved, and here I cannot doubt the correctness of the ruling of the Court. We have seen that the whole case was resolved into a question of fact for the jury, viz., what was the intention of the Plaintiff in reserving this sum of $21.50? Not, it must be observed, whether she intended to take usury; for the law defines what usury is, or whether it be taken intentionally or ignorantly is immaterial. But whether it was intended as compensation for the loan, or as compensation for trouble and expense incurred in collecting the money to be loaned, was precisely the question of fact for the jury; and the law is now well settled, under the rule admitting parties to testify in their own behalf, that where the character of the transaction depends upon the interest of the party, it is competent, when that party is a witness, to inquire of him what his intention was. (Seymour *v.* Wilson, 14 N. Y. 567; Forbes *v.* Waller, 25 id. 430; Griffith *v.* Marquardt, 21 id. 121; McKown *v.* Hunter, 30 id. 625; Bedell *v.* Chase. 34 id. 286.) The answer to such question is, of course, not conclusive, but to be weighed and considered

by the jury with the other evidence in the case, in passing upon the question of actual interest.

In this case, to find a verdict for the Plaintiff, under the charge of the Court, the jury must have found that the sum reserved by her upon the face of the note was taken conclusively for expenditures of time, services, and money in obtaining the money to be loaned to Cornell, without any intent to evade the statute against usury; that those expenditures were made at the request of Cornell, and upon his express promise to pay her therefor; and that the sum reserved was not more than a reasonable compensation for such expenditures. Such being the findings of the jury, and no error appearing in the rulings or the charge of the Court, the motion for a new trial was properly denied.

The order appealed from should be affirmed.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

JUNIUS H. HATCH, RESPONDENT, *v.* THE CITY OF BUFFALO, APPELLANT.

Assessment—Evidence of Regularity—Cloud on Title.

When the tax or assessment complained of is void upon its face, or when the evidence necessary to enable a party to claim under it, will of itself show the tax to be void, then a bill to set aside the assessment, or to remove the cloud from the title, will not lie.

But when the record itself is sufficient evidence to establish title, it constitutes a cloud upon such title, and an action will lie to remove it.

When the law required that, in order to authorize certain work to be done in the city of Buffalo, the city assessors, or a majority of them, should certify that a majority of the property-holders in said city liable

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Cloud on title—What is—Removal. 40 *N. Y.* 549; 48 *N. Y.* 179, 187; 59 *N. Y.* 283; 63 *N. Y.* 134, 492; 69 *N. Y.* 514; 77 *N. Y.* 546; 70 *Hun,* 424 (53 *St. Rep.* 689; 24 *N. Y. Supp.* 466); 16 *App. Div.* 384 (45 *N. Y. Supp.* 22). 53 *How. Pr.* 216; 47 *St. Rep.* 667 (20 *N. Y. Supp.* 333).

Tax—Assessment—Regularity—Presumption. 53 *N. Y.* 435; 12 *Hun,* 187; 44 *How. Pr.* 338; 37 *Super. Ct.* 581.

to be taxed or assessed to pay for the improvement had applied to have such work done, and such work was ordered to be done without the proper certificate of the assessors—held, that an assessment made to pay for such work was illegal and void, and that a bill would lie to set it aside.

THIS action is brought to set aside certain assessments upon lands of the Plaintiff, to defray the expense of grading and paving Niagara Street, in the city of Buffalo, and for various cross-walks, sewers, etc., and to restrain the Defendants from taking any proceedings to collect the assessments.

The Defendants demurred to the complaint. The Special Term overruled the demurrer, and, upon appeal, the General Term of the Eighth District affirmed the judgment. The Defendants now appeal to this Court.

The illegality alleged is based upon the want of a sufficient certificate by the assessors, as required by section 20 of the Act of 1856, page 143. That section provides as follows: "Nor shall any such work be ordered until there shall be presented . . . a certificate signed by the city assessor, or a majarity of them, stating that such application is made by a majority of such property-holders resident in said city and liable to be taxed or assessed to pay for the same, which certificate shall be conclusive evidence that such application is made by a majority, as required by this section."

The certificate in question was headed: "Proposed improvement of grading Niagara Street the full width thereof, and paving a carriage-way forty-two feet wide, . . . and constructing all necessary sewers and receivers, sluices and cross-walks in said streets, between the points above named;" was signed by two assessors, and certified that the "application for the above improvement is made by a majority of the property-holders resident of the said city and directly interested therein and liable to be taxed or assessed to pay for the same." The expense of constructing sewers, sluices, and receivers could not by law be included in said assessment.

D. F. Day for Appellant.
Geo. Wadsworth for Respondent.

HUNT, Ch.J.—This assessment has been holden by this Court to be illegal and void in four several cases presented upon the same assessment. (Lathrop *v.* The City of Buffalo; Dolan *v.* The Same; Howell *v.* The Same; Efner *v.* The Same.) Neither of these cases is reported. The majority referred to in the certificate may have been composed of those interested in the sewers and sluices only, and would not necessarily be subject to taxation for the paving and grading provided for.

The question principally contested in this suit is, whether an action in the present form can be sustained, or whether the relief to which the Plaintiff was entitled should not have been sought by a writ of certiorari. The principle by which this point is to be determined is this: if the tax or assessment complained of is void on its face, or if the proof necessary to be made to enable a party to claim under it will of itself show that it is void, then a bill to set aside the assessment, or, as it may be called, to remove the cloud upon the title, will not lie. When, however, the claimant could establish a title by the record upon his assessment, then there is such a cloud as the owner may legally ask to have removed.

This subject was carefully examined, and the conclusion reached by a unanimous decision of this Court in the case of Scott *v.* Onderdonk (14 N. Y. 9). That case bore a remarkable resemblance to the one now before us, and stands as nearly quatuor pedibus with it as can well be imagined. The Plaintiff there asked to be relieved from a pretended assessment affecting his property, alleging that the corporation had sold it, that the Defendant was the purchaser, and that the sale was about to be consummated by the making of a conveyance for a long term of years, and alleging that there was in fact no assessment. It was objected that, upon the complaint, there was no color of right to sell, and therefore no cloud on the title; that the purchaser would be compelled, when he claimed the property, to show his title step by step, and that he would necessarily himself show that he had no title.

To this reasoning the Court assented, but held that it was assumed by that section of the charter which provided that the conveyance to be taken on the sale shall briefly set forth the proceedings had for the sale of the premises, that, by force thereof, the purchaser should be entitled to the possession, and that "such conveyance shall in any such proceeding be deemed primâ facie evidence of the facts therein recited and set forth." This the Court held would furnish presumptive evidence of the passage of the ordinance and the assessment made under it, and that it could only be impeached by proof aliunde of the falsity of its recitals. Upon this ground the bill was sustained. (See also Heywood *v.* the City of Buffalo, 14 N. Y. 534.)

The same principle will govern the case now before us. If the declaration of sale should be made to the purchaser, it would contain a description of the premises, the fact of assessment, advertisement, and sale, the date of the sale and the period for which the premises shall be sold, and what it is declared by the statute shall be "presumptive evidence in all courts and places that such tax or assessment was legally imposed, and that due proceedings to authorize such sale were had." (Laws 1853, page 477, § 18.) It is alleged in the complaint that the Plaintiff fears that such declaration is about to be issued, and the Plaintiff prays relief against it. The language of this statute is more explicit and emphatic than that under which Scott *v.* Onderdonk was decided. The statute then in force simply enacted that the conveyance should be evidence of the facts therein recited and set forth. The statute before us enacts that it shall be evidence that the assessment was legally imposed, and that due proceedings to authorize the sale had been taken. The purchaser at this sale would only be required to produce his certificate or declaration from the city, and this law supplied every intendment necessary to support his recovery. The present case is plainly within the decision of Scott and Onderdonk, and justifies the present action.

It is said that in the case of Howell v. The City of Buffalo a contrary decision was made by this Court, the opinion being

written by Judge Marvin. No such opinion has been reported, nor is any certified copy of the same furnished to the Court. So far as it appears, however, from the opinion contained in the brief, accompanied by a letter from its author, it is evident that the decision, if so made, was based upon an error in fact. In the letter referred to it is said: "I assumed that the threatened declaration following a failure to redeem would, by recital, show the defect of jurisdiction. It must show the fact of assessment, and this cannot be shown without it appearing that the assessor certified," &c. This is an error. As already quoted, the statute requires the declaration to contain a description of the premises, the fact of assessment, advertisement, and sale, the date of the sale, and the period for which the premises are sold, and nothing else. There would be nothing on the face of the declaration to show the illegality of the assessment, and nothing therefore to distinguish it from Scott and Onderdonk. A decision not found in the regular reports is, by our practice, more readily subject to modification and control than when the same has gone forth with all the apparent authority of this Court. Especially should we so hold when the decision is based upon an evident error.

The judgment should be affirmed with costs.

Affirmed.

JOEL TIFFANY,
State Reporter.

LEWIS P. ALLEN ET AL., RESPONDENTS, *v.* THE CITY OF BUFFALO, APPELLANT.

THIS case should be decided in the same way. The fact of there being several Plaintiffs will not affect the case. That is a question of form, which, not having been taken at any previous stage of the action, so far as the case shows, cannot be raised here. Besides, an improper joinder of parties Plaintiff is not a subject of demurrer. (Code, § 144.)

JOEL TIFFANY,
State Reporter.

Parties—Misjoinder—Demurrer. 53 *N. Y.* 649; 18 *Hun,* 142.

THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, APPELLANT, v. HENRY ERBEN AND THE NEW YORK LIFE INSURANCE AND TRUST COMPANY, RESPONDENTS.

Moneys paid by mistake—Voluntary payment.

Money paid by mistake as to the amount due may be recovered back. It cannot be considered as a voluntary payment.

THIS is an appeal by the Appellant from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment rendered upon a report of a Referee in favor of the Defendants. The action was brought to recover back the sum of $9,000, alleged to have been paid to the Defendants, upon an award made to the Defendant Erben for land taken in the extension of Canal Street.

The Referee found the following facts and reached the conclusions of law following:

1. That in the year 1852, and until the month of May, in the year 1855, the Defendant Erben was the owner in fee of three lots of land situate in Centre Street, in the city of New York, and known by the street numbers one hundred and fifty-eight (158), one hundred and sixty-four (164), and one hundred and sixty-six (166) Centre Street, subject, however, to a certain mortgage executed by the said Defendant Erben to the Defendant The New York Life Insurance and Trust Company, to secure the payment of the sum of four thousand five hundred dollars, with the interest thereon.

2. That the said lots of land, during all the time aforesaid, were each worth at least the sum of twelve thousand five hundred dollars.

Money paid by mistake—Action for—Demand. 90 *N. Y.* 229; 46 *St. Rep.* 435 (19 *N. Y. Supp.* 435); 46 *St. Rep.* 436 (19 *N. Y. Supp.* 503).

Appeal—When permitted—Laches. 50 *N. Y.* 498; 56 *N. Y.* 229; 3 *Hun,* 221; 4 *Hun,* 605; 61 *Barb.* 45; 55 *How. Pr.* 58; 4 *Lans.* 469; 5 *T. & C.* 437.

3. That some time before the month of May, 1856, the Plaintiff procured, in the Supreme Court, the appointment of commissioners of estimate and assessment, to assess the benefit and award the damages to the owners of property within the line of the improvement in the matter of the extending of Canal Street and the widening of Walker Street, in the city of New York.

4. That the whole of the said lot, one hundred and sixty-four (164), and certain parts of the lots numbers one hundred and fifty-eight (158) and one hundred and sixty-six (166) Centre Street were required for and were taken for the extension of Canal Street.

5. That such lots and parts of lots so required and taken for such extension were worth, at that time, the sum of twenty-five thousand dollars.

6. That the Defendant Erben attended before the said commissioners of estimate and assessment from time to time,, upon their request, and was informed by the said commissioners that the amount awarded to him for the said lots was about the sum of twenty thousand dollars over and above the amount assessed against him for the benefit to the other property owned by him within the line of said improvement.

7. That the said commissioners afterward made and filed with the Street Commissioner of the city of New York their report, in and by which they did, among other things, award to the Defendant Erben, for the said parts of lots numbers one hundred and sixty-four (164) and one hundred and sixty-six (166) Centre Street, the sum of nine thousand and fifty dollars, out of which a sufficient sum was to be paid to the Defendant the New York Life Insurance and Trust Company to satisfy a mortgage thereon for the sum of four thousand five hundred dollars, with the interest due thereon; and did also award to the Defendant Erben, for the said lot number one hundred and fifty-eight (158) Centre Street, the sum of six thousand seven hundred and fifty-five dollars, out of which a sufficient sum was to be paid to the Defendant The New York

Life Insurance and Trust Company to satisfy a mortgage thereon for the sum of four thousand five hundred dollars, with interest due thereon.

8. That at the time of the making of the said report, or at any time previous thereto, there was but one mortgage, which was a lien upon the said lots or parts of lots, which mortgage was executed by the Defendant Erben to the Defendant The New York Life Insurance and Trust Company, to secure the payment of the sum of four thousand five hundred dollars, with the interest thereon, and upon which mortgage, at the time of the payment of the sum of money hereinafter mentioned, there was due, for principal and interest, the sum of four thousand one hundred and twenty-four dollars and forty-three cents, and no more.

9. That, after the said report of the said commissioners was so filed, the Defendant Erben called at the office of the Street Commissioner of the city of New York, and requested of the clerk of said Street Commissioner permission to examine the said report; and the said report was not shown or examined by the Defendant Erben, but in lieu thereof he was informed by such clerk, and believed that the amount awarded to him for damage was about the sum of twenty thousand dollars over and above the amount assessed against him for benefit to other property owned by him within the line of said improvements; which assessment amounted to the sum of four thousand dollars or thereabouts; upon which information the said Defendant relied, and he had no other knowledge or information upon the matter aforesaid.

10. That afterward, and on or about the tenth day of May, 1855, upon the Defendant Erben demanding the same as due under said report, the Plaintiff made and delivered to the Defendant The New York Life Insurance and Trust Company two warrants duly drawn by them upon the Mechanics' Bank in the city of New York, both dated on that day, and both payable to the order of the Defendant Erben and the order of the Defendant The New York Life Insurance and Trust Com-

pany, one of which warrants was numbered 1179, and was for the sum of thirteen thousand five hundred and fifty dollars, and the other of which warrants was numbered 1180, and was for the sum of eleven thousand two hundred and fifty-five dollars, both of which warrants were duly endorsed by the Defendants, and were afterward paid by the said Mechanics' Bank in the city of New York to the Defendant The New York Life Insurance and Trust Company, and for which warrants a receipt was signed by the Defendants.

11. That the Defendant The New York Life Insurance and Trust Company had no notice or knowledge of the amount awarded to the Defendant Erben, other than that contained in the said warrants and receipts, and that the Defendant The New York Life Insurance and Trust Company received the said warrants, and the money paid thereon, for the purpose of making distribution of such money as between the Defendant the New York Life Insurance and Trust Company and the Defendant Erben, and not otherwise; and that the Defendant the New York Life Insurance and Trust Company did, after the receipts of the said sums of money mentioned in the said two warrants, make distribution thereof by retaining the said sum of four thousand one hundred and twenty-four dollars and forty-three cents, and by paying over the Defendant Erben the sum of twenty thousand six hundred and eighty dollars and fifty-seven cents.

12. That the Plaintiff voluntarily made and delivered the said warrants to the Defendants, with full knowledge of the several matters stated in the report of the said commissioners.

As conclusions of law the Referee found,—first, that the Plaintiff, having voluntarily paid the sum of money above mentioned, cannot maintain this action for the recovery of any part thereof.

Second, that each of the Defendants are entitled to judgment against the Plaintiff, with the costs of this action.

Richard O'Gorman for Appellants.

Samuel Hand for Respondents.

HUNT, Ch. J.—After setting forth the general facts of the case in their complaint, the Plaintiffs close by alleging that, at the Defendants' request, they paid the Defendants for such damages the sum of $24,805. They further allege that the said payment was made under a mistake of fact on the part of the Plaintiffs, and under the supposition that the sum above mentioned was the sum of the payments to which the Defendants were entitled, under and by virtue of the report of the commissioners of estimate and assessment.

In his answer the Defendant Erben, among other things, says, that he received the sums mentioned under the full belief that the same was the amount awarded to him by the said report over and above any encumbrance upon the premises, and he insists that the same was such amount. He further insists that the same was so paid and received as waiver by all parties of all objections to the said report, and with full knowledge that such sums were rightfully payable, if erroneously stated in several parts of said report, and with intent to consummate the duty and purpose of said commissioners, whether correctly expressed in said report or by mistake erroneously stated therein.

The commissioners awarded to the Defendant Erben the sum of $15,755. He received from the Comptroller of the city warrants to the amount of $24,805, upon which the money was paid to him. The Referee finds, that Erben believed that amount was due to him when it was thus received. The Plaintiffs, in their complaint, allege that the excessive payment was an error on their part, and there is nothing in the evidence to indicate that such is not the fact. There is not the least evidence to show that the Comptroller intended to pay Mr. Erben a dollar more than he was legally entitled to. To have done so would have been a violation of his duty. There is no evidence that the Plaintiff, as a corporation, ever recognized such action. The Defendant testifies, and the Referee finds, that he believed that amount to be due to him by the report, as it was paid to him. It is thus apparent that the excess over $15,755 was paid to the Defendant in mistake of the facts.

I cannot understand how the Referee could have reached the conclusion that the Plaintiff voluntarily delivered the warrants to the Defendant, in the full knowledge of the several matters stated in the report of the commissioners. I am not able to reconcile it with the previous finding that the money was paid upon an erroneous understanding of the amount actually awarded to Mr. Erben, nor do I see any warrant for it in the evidence. No witnesses on either side give any testimony from which such a conclusion can be drawn.

The Plaintiff and the Defendant mutually supposed that the report of the Commissioners, which had been confirmed by the Supreme Court and filed, awarded to the Plaintiff the sum of $24,000, and that sum was thereupon paid to him. For the money thus received in excess of the amount actually awarded, the Defendant would no doubt be primâ facie liable to respond to the Plaintiff. The general rule is clear, that money paid in a mistake of facts as to what both parties were bound to require, may be recovered back. (Bank of Commerce *v.* Union Bank, 3 Comst. 230; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Wheadon *v.* Olds, 20 Wend. 174.)

In answer to this demand, the Defendant insists that this is in substance an action for money had and received to the use of the Plaintiffs, in which action it is said the most liberal rules prevail, and in which the Defendant may interpose every equitable defence, and may shield himself by anything which shows that ex aequo et bono, the Plaintiff is not entitled to recover. This is true. The Defendant further insists that the evidence introduced by him shows, that upon these principles the Plaintiffs cannot here succeed.

He has proved, as he says, by indisputable evidence, that the property appropriated under the proceedings to extend Canal Street was worth the full sum he has received for it, and that, upon application at the commissioners' office, he was informed by them, and afterward by their clerk, that about the sum received by him had been actually awarded to him.

It is quite probable that the Defendant was not awarded

as much as he should have been for his lots on Centre Street, and it is equally probable that he failed to have that error corrected, on account of the erroneous information given to him by the clerk at the office of the commissioners. This is unfortunate, but it cannot aid the Defendant here. The whole proceeding of the commissioners is judicial in its character, is subject to review and correction in the Supreme Court, and is finally made a part of the records of that Court. To overhaul judgments thus established, upon the ground that a clerk or an officer in the commissioner's office, upon whose statement of their contents a party had relied, instead of making a personal examination of the record, had incorrectly stated their contents, could not be tolerated. Nor will it aid the case to allege that in fact the Defendant was not awarded as much for his lots as he ought to have been. Neither the Referee, nor the Superior Court, nor this Court have jurisdiction in this action to examine that question. It is intrusted by law to the commissioners solely, subject to an appeal to the Special Term of the Supreme Court; and no other Judge, jury, Court, or Referee has the slightest authority to examine into the matter.

The Plaintiffs were entitled to a recovery against Mr. Erben, and a new trial must be ordered as to him. Judgment as to the Life Insurance and Trust Company should be affirmed.

JOEL TIFFANY,
State Reporter.

DONALD KENNEDY, RESPONDENT, v. ALBERT H. GOSS, APPELLANT.

Promissory Note—Discharge of Maker—Extension by holder.

A maker of a note is not discharged from his liability thereon by the holder of such note making an agreement with another party that, in consideration said party will endorse, the time of its payment shall be extended.

Nor is such maker discharged, although he has, in equity, become surety that a co-maker of the note shall pay the same.

ABOUT the 29th of August, 1859, and for some four years previous thereto, Charles N. Tuttle, Job Moses, and Sanford Greenman were copartners, as dealers in patent and other medicines, at Auburn, under the firm name of Tuttle, Moses & Greenman.

The Plaintiff, during their copartnership, sold and delivered to them medicines, &c., and on the 29th of August, 1859, there was a balance due to the Plaintiff of $2,711.38, for which the firm gave their note to the Plaintiff, payable sixteen months after date, with interest. On or about the first of September, 1859, Tuttle purchased the interest of Moses and Greenman in the firm property, agreeing to pay the firm liabilities; and thereupon Tuttle as principal, and Austin Sherman as surety, executed a bond to Moses and Greenman, in the penalty of $25,000, conditioned to "assume and pay in full the liabilities of the said firm of Tuttle, Moses & Greenman, and at all times fully indemnify and save the said Moses and Greenman harmless therefrom, and from all costs and expenses on account of the same," &c.

In pursuance of an agreement between Tuttle, Moses & Greenman and the Defendant, in connection with the purchase, and as part of the purchase, the Defendant executed to Moses and Greenman a guaranty of the performance of the bond of indemnity by Sherman, with this clause: "It being the intent hereof that I shall become liable only in the event of deficiency after exhausting the remedies of the obligees in said bond

against the obligors thereof." The note of the firm to the Plaintiff for $2,711.38 is still owing and unpaid.

On or about the 28th of February, 1862, Moses and Greenman assigned the bond and guaranty aforesaid to the Plaintiff. In March, 1862, the Plaintiff commenced a suit against Tuttle and Sherman, upon their bond, the complaint setting forth the above facts, except those relating to the guaranty by the Defendant, and, on the 14th of April, 1862, recovered a judgment against the Defendants therein for the penalty of the bond, the damages being assessed at $3,209,46, and $22.30 costs.

Executions were issued upon the judgment, and returned nulla bona.

The debt to the Plaintiff remains wholly unpaid, and this action is upon the guaranty.

At the trial before the Court, without a jury, it was proved, in addition to the foregoing facts, that on the 26th of March, 1860, the Plaintiff verbally proposed to Sherman that he would pay him $75, and extend the time of payment of the note for $2,711.38 one year from the time of its maturity, if Sherman would endorse the note; that Sherman consented, and endorsed the note, and the Plaintiff paid him the $75. All this was without the knowledge or consent of the Defendant, and the Plaintiff did not take any legal proceeding to collect the note until after one year from its maturity; the agreement was not in writing, and the only evidence thereof was mere verbal testimony, which was received under objection by the Plaintiff, that the agreement was within the statute of frauds and void.

The decision at the trial, directed judgment in favor of Plaintiff for $3,410.72 and costs.

Judgment having been entered according to the decision, the Defendant served exceptions and appealed to the General Term, where the judgment was affirmed. The Defendant thereupon appealed to this Court.

S Hand for the Appellant.

T. R. Strong for the Respondent.

GROVER, J.—There was evidence tending to establish all the facts found by the Judge. The exceptions to his findings of fact are not, therefore, available in this Court. The only exception to his legal rulings, necessary to consider, is that to his conclusion, that, from the facts found, the Plaintiff was entitled to recover.

By the assignment of the bond of Sherman, and the guaranty of the Defendant to the Plaintiff by Moses and Greenman, the Plaintiff is entitled to recover upon the guaranty, if Moses and Greenman could have recovered thereon. The ground relied upon by the Defendant's counsel to defeat a recovery by the Plaintiff is, that the Defendant was the surety of Sherman, upon his bond, and that the Plaintiff, by giving an extension of a year for the payment of his note to Sherman, without the consent of the Defendant, has thereby discharged him. A close examination of the facts found will, I think, render this ground entirely inapplicable to the present case. The debt of the Plaintiff was against Tuttle, Moses and Greenman. They were all equally the principal debtors of the Plaintiff originally, and there is nothing showing that the Plaintiff had any knowledge that the relation of these parties was at all changed between each other in respect to his debt. It is true that, upon the sale of the assets of the firm by Moses and Greenman to Tuttle, the latter agreed to pay all the debts of the firm, including the note of the Plaintiff; but he had no knowledge of this arrangement. He was not, therefore, at all affected by it, and his rights arising from subsequent dealings by him with any of the parties cannot be affected by the relation created by the agreement between Tuttle, Moses, and Greenman, by which, as between them, Tuttle became the principal debtor, and Moses and Greenman his sureties. (Gahn *v.* Niemcewicz's Exrs., 11 Wend. 312.)

The injury then is, whether the agreement of the Plaintiff with Sherman to extend the time for one year for the payment of the note discharged Moses and Greenman from their liability to the Plaintiff, and, consequently, Sherman

from his liability upon his bond to them. If it did not, it follows that Moses and Greenman could at any time have paid the debt, and proceeded for their indemnity against Sherman upon his bond, and against the Defendant as guarantor when properly charged as such, notwithstanding the Plaintiff's agreement with Sherman. Moses and Greenman were not parties to this agreement, and were not bound by it. The Plaintiff had no knowledge that Sherman was in any way liable for the payment of their note, and his only object in making the agreement with him was to render him liable by procuring his endorsement of the note. The question in this case is, whether one or more makers of a note are discharged from liability thereon by the holders making an agreement with some other person to extend the time of payment, in consideration of the endorsement of the note by such other. The bare statement of the question is sufficient to show that no such result could follow. The liability of the maker is not at all affected by such agreement. Whether the maker could avail himself of the extension agreed to be given to such subsequent endorser, need not be determined. It is clear that he is not discharged, and that his right to pay his debt is not suspended. This being so, Moses and Greenman's right to proceed against Sherman on his bond was not suspended, or the right of the Defendant to require them so to proceed; and, consequently, his liability as guarantor of Sherman's performance was not discharged. This liability, as assignee of Moses and Greenman, the Plaintiff is seeking to enforce; and the agreement by the Plaintiff with Sherman to extend the time of payment of the note, in consideration of his endorsement having been made in ignorance of any change in the relations of Moses, Greenman and Tuttle in respect to the note, and of Sherman's liability for its payment by virtue of his bond, or the Defendant's guaranty of the same, furnishes no defence to the action. The judgment must be affirmed.

WOODRUFF, J.—By the giving of time to Sherman, the

principal debtors, Moses and Greenman, were not released from their liability to the Plaintiff; they were absolutely bound to him for the debt. True, Sherman had become bound to them that Tuttle should pay it; but the Plaintiff's agreement, if it be regarded as giving time to Sherman to perform his duty to Moses and Greenman, did not operate to discharge them, whether Kennedy had knowledge of Sherman's previous undertaking or not.

It follows, that when the period of extension had expired, Moses and Greenman remained liable to the Plaintiff. Sherman had not paid the debt.

The Defendant had become bound to them that Sherman should perform his undertaking, and Sherman had not done so. Thereupon a clear liability of the Defendant to Moses and Greenman arose, which they could enforce. The debt was not paid. Nothing had been done which could operate to release them. They had done nothing which could operate to release Goss, the Defendant, from his obligation to them, that the debt should be paid.

Kennedy, the Plaintiff, could maintain his action against them, and compel payment. They, in turn, could mantain their action against this Defendant, and recover from him that which he had agreed Sherman should pay for them.

In this relation between them and this Defendant, Goss, it was entirely competent to them to assign to Kennedy, the actual creditor, their right to pursue this Defendant, surety to them, and they have done so.

On this ground I concur in affirming the judgment.

MASON, J., concurs in this view of the case, and places his vote solely upon this ground.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

THOMAS D. GREEN, RESPONDENT, *v.* WILLIAM H. SHUMWAY AND DAMON COATS, IMPLEADED WITH FRANCIS A. THAYER, APPELLANTS.

Test Oath—Ex post facto law—Unconstitutionality.

That portion of the "Act to provide for a convention to revise and amend the Constitution," passed March 29, 1867, which provided that at the election of delegates no person shall vote who will not, if duly challenged, take and subscribe the following oath: "I do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto; and did not wilfully desert from the military or naval service of the United States, or leave this State to avoid the draft during the late rebellion."

Held void.

It violates both the Constitution of the United States and the Constitution of the State of New York. Per MILLER, J.

It is inconsistent with the just interpretation of the Constitution of the State of New York. Per GROVER, DWIGHT, and CLERKE, JJ.

The decisions of the Supreme Court of the United States require that it be held to violate the Constitution of the United States, but it is in no conflict with the Constitution of New York. Per BACON, J.

HUNT, Ch.J., and MASON and WOODRUFF, JJ., dissented; holding the act valid, and not inconsistent with either Constitution.

APPEAL from judgment of General Term of the Sixth District reversing judgment in favor of Defendants.

The complaint alleged that, pursuant to the Constitution of the State of New York, and an act of the Legislature passed in March, 1867, a lawful election was held throughout the State on the 23d day of April, 1867, for the purpose of choosing delegates to meet in convention at the Capitol on the first Tuesday of June, 1867, to revise the Constitution of the State, and to amend the same.

Citizenship—Forfeiture—Statute—Constitutionalty. 61 *N. Y.* 426; 58 *Barb.* 128 (40 *How.* 103); 5 *Lans.* 218.

That each qualified elector was entitled to vote for delegates at large, and for delegates chosen in the senatorial district in which he might reside; that the Plaintiff was a native-born white citizen, of full age, and a resident of the Third Ward of the city of Syracuse, which constitutes an election district; that the Defendants were inspectors of election for said ward; that the Plaintiff was a duly qualified elector in said district on the 23d day of April, 1867, and entitled to vote; that after the Defendants had entered upon the duties of their office as inspectors, and had duly opened the polls of such election, on the day aforesaid, the Plaintiff offered to vote, and presented a ballot for that purpose, and requested the Defendants to receive the same; that the Defendants, fully intending to deprive him of his rights and franchises as a citizen, refused to receive the ballot so offered, and would not, and did not, permit the Plaintiff to vote at the election, and claims one thousand dollars damages.

The answer of the Defendants Shumway and Coats, who appeared, recites and alleges that, by the said act of the Legislature of this State, mentioned and referred to in said complaint, the qualification of electors for the election of senatorial delegates and delegates at large, to meet in convention to revise and amend the Constitution, is prescribed, with the provision that no person shall vote at said election who will not, if duly challenged, take and subscribe the following oath, to wit: "I (A. B.) do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto; and did not wilfully desert from the military or naval

service of the United States, or leave this State to avoid the draft, during the late rebellion."

The Defendants then allege that, at the time of the offering of his said ballots for the election of delegates, the Plaintiff was duly challenged as an elector of said district, and required to take and subscribe the oath aforesaid; that the oath was read to him, and he refused to take and subscribe the same. And upon such refusal, the Defendants refused to receive the ballot and deposit the same in the boxes, prepared for that purpose, because the Plaintiff thus refused, and returned the same to him. They aver that such refusal to receive and deposit the ballot was made for the purpose of discharging their duty as such inspectors under the act referred to, and ask for a dismissal of complaint.

The Plaintiff demurred to the answer. The Special Term, upon argument, sustained the demurrer, and ordered that the complaint be dismissed, with costs. Upon appeal to the General Term the order of the Special Term was reversed, and judgment ordered for the Plaintiff on the demurrer, and the assessment of damages, with leave to amend. The damages were stipulated at fifty dollars, and the Defendants appealed to this Court.

William H. Shumway and Damon Coats, in person, for the Appellants.

George F. Comstock for the Respondent.

MILLER, J.—This case involves the constitutional validity of that portion of the act to provide for a convention to revise and amend the Constitution of this State, which excludes from the privilege of voting all who refuse to take the test-oath prescribed by the act in question (Sess. Laws of 1867, chap. 194, § 2, p. 287).

I think that the oath in question was unconstitutional and invalid, for the reasons which I will proceed to state. The first subdivision of the tenth section of the first article of the Constitution of the United States provides, that "No State shall pass any bill of attainder, ex post facto law, or law im-

pairing the obligation of contracts; or grant any title of nobility." The provision of the act which is to be considered declares that no person shall vote at the election for delegates to said convention who will not, if duly challenged, take and subscribe an oath that he has not done certain acts mentioned therein; and inflicts the penalty of political disfranchisement, without any preliminary examination or trial, for a refusal to take said oath.

By this enactment the citizen is deprived, upon declining to conform to its mandate, of a right guaranteed to him by the Constitution and the laws of the land, and one of the most inestimable and invaluable privileges of a free government. There can be no doubt, I think, that to deprive a ctiizen of the privilege of exercising the elective franchise, for any conduct of which he has previously been guilty, is to inflict a punishment for the act done. It imposes upon him a severe penalty which interferes with his privileges as a citizen, affects his respectability and standing in the community, degrades him in the estimation of his fellow-men, and reduces him below the level of those who constitute the great body of the people of which the government is composed. It moreover inflicts a penalty which, by the laws of this State, is a part of the punishment inflicted for a felony, and which follows conviction for such a crime. It is one of the peculiar characteristics of our free institutions, that every citizen is permitted to enjoy certain rights and privileges, which places him upon an equality with his neighbors. Any law which takes away or abridges these rights, or suspends their exercise, is not only an infringement upon their enjoyment, but an actual punishment. That such is the practical effect of the test-oath required by the act in question can admit of no doubt, in my judgment. It arbitrarily and summarily, and without any of the forms of law, punishes for an offence created by the law itself.

In the formation of our national Constitution, its framers designed to prevent and guard against the exercise of the power of the Legislature by usurping judicial functions, and

for the punishment of alleged offenders, in advance of trial, for offences unknown to the law, and by bill of attainer, and ex post facto enactments.

Laws of this character were considered as among the most mischievous and vicious class of judicial legislation, and in England were made the instrument for gross abuse, and a tremendous engine of political power. Resorted to in times of high political excitement, they were the means of inflicting great wrong and injustice. They sometimes affected the dead as well as the living, and were the instruments of transcendent iniquity (Dwarris, Part I. 310; 2 Story on Const. § 1344). In a free government such legislation could not be endured, and hence it was that the Constitution so emphatically prohibited it.

When the act in question was passed by the Legislature, there was no law in this State which condemned or characterized the conduct which is punished in this act, by depriving the citizen of the right of suffrage. This law creates a new crime, and makes an offence which did not previously exist. It punishes for an act which was not a crime when committed. But, even if the alleged offences incorporated in the oath prescribed were known to the law, the statute in question, in violation of the rules of the common law, pronounces judgment of condemnation without evidence, without any opportunity to defend against the charge, and without a trial. It makes the party the accuser of himself, and his refusal to acquit himself for any cause, his own condemnation. It punishes for an offence before an accusation is made and a trial had judicially, according to the Constitution and the laws of the land. It compels him, in direct violation of the fifth amendment of the Constitution of the United States, "to be a witness against himself." His refusal to testify that he is innocent operates to produce his conviction, and seals his guilt. The object of the fifth amendment last cited was to prevent the party from being called upon as a witness of his own guilt, and to insure to him a full and fair trial by due process of law.

To compel him to testify would violate this provision; and indirectly, to make a refusal to testify a cause for punishment effects the very same purpose. It is only an evasion of the provision cited, to condemn a person for a refusal to swear to innocence.

That the Federal Constitution is violated by the provision of the act to which I have referred, I entertain no doubt. It is essentially, in the particulars indicated, both a bill of attainer, or of pains and penalties, and an expost facto law. We are not without authority to sustain the views I have expressed; and the subject has recently undergone a thorough discussion and examination in the Supreme Court of the United States, so as to render further elaboration entirely needless.

In Cummings *v.* The State of Missouri (4 Wal. 277), a bill of attainer is defined to be a legislative act which inflicts punishment without a judicial trial. Field, J., who delivered the opinion of the Court, remarks: "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainer include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judges; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence." The learned Judge cites cases from British history where bills of this character had been passed; and the Court held that the second article of the Constitution of the State of Missouri, which required a test-oath from priests and clergymen in order that they might continue in the exercise of their professions, and be allowed to preach and teach, constituted a bill of attainder, within the meaning of the provision of the Federal Constitution prohibiting the States from passing bills of that character.

The Court also held that the clauses of the same article, in depriving priests and clergymen of the right to preach and teach, impose a penalty for some acts which were innocent at the time they were committed, and increase the penalty prescribed for such of the acts specified as, at the time, constituted public offences, and in both particulars violate the provisions of the Federal Constitution prohibiting the passage by the States of an ex post facto law. That they further violate that provision in altering the rules of evidence with respect to the proof of the acts specified; thus, in assuming guilt instead of the innocence of the parties; in requiring them to establish their innocence, instead of requiring the government to prove their guilt; and in declaring that their innocence can be shown only in one way, by an expurgatory oath. The learned Judge, in reference to the clause of the Constitution which inhibits the passage of an ex post facto law, says "By an ex post facto law is meant one which imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that prescribed; or changes the rule of evidence, by which less or different evidence is sufficient to convict than was required." (See also Calder *v.* Bull, 3 Dall. 386-390; Fletcher *v.* Peck, 6 Cranch, 137.) It is clearly manifest that the law under consideration was liable to the objection, that it was both a bill of pains and penalties and an ex post facto law, within the principles laid down in the case cited. It not only inflicted pains and penalties, but it imposed punishment for acts not punishable at the time they were committed, and changed the rule of evidence as to the testimony required to convict.

In Ex parte Garland (4 Wal. 333) a similar case was presented, and it was held that an act of Congress which excludes from practicing in the Federal Courts any attorney or counsellor who refuses to take a test-oath precisely like the oath required by the provision of the act in question, with the exception of the last clause, relating to desertion, partakes of the nature of a bill of pains and penalties, and is subject to the con-

stitutional inhibition against the passage of bills of attainder, are included; and that, in the exclusion which the act adjudges, it imposes a punishment for some of the acts specified which were not punishable at the time they were committed, and for other of the acts it adds a new punishment to that before prescribed, and it is thus within the inhibition of the Constitution against the passage of an ex post facto law.

Independent of any views which may be entertained, the cases cited cover the question discussed, and are decisive and controlling. Any further discussion would therefore be unnecessary; but it is not inappropriate to add, that all oaths of an expurgatory character, especially when applied as a means of punishment for past acts, not at the time recognized and known to the law as penal or criminal, have been regarded in all countries, in modern times, as odious and inquisitorial; and passed, as they usually are, in times of high excitement, upon the return of cool judgment and calm reason have been condemned and repealed by legislative enactments. Such was the case in our own State, after the termination of the Revolutionary struggle. Severe laws of such a character had been passed during that period; and even after its close, when peace had returned, rigid enactments were made which excluded from the legal profession many eminent lawyers of that generation. A more enlightened and liberal spirit, however, under the guidance of the most able statesmen and the profound jurists of that day, finally prevailed, and those who had been banished from the country were allowed to return, restored to the privileges of citizenship by the repeal of disabling laws; and, in one instance at least, where the party had the misfortune to differ from his neighbors and friends upon the great question of American independence, after years of absence and expatriation in a foreign land, was allowed to resume his former position in the legal profession, where his talents, extensive acquirements, and profound learning shed lustre upon the jurisprudence of the State, and the purity and consistency of his life to an advanced age commanded the respect, confidence, and veneration of the entire community.

I am also of the opinion that the statute in question violates the Constitution of the State of New York.

The first section of the second article of the Constitution prescribes the qualifications of electors who shall be entitled to vote "for all officers that now, or hereafter, may be elected by the people."

The second section of the thirteenth article provides for the submission of the question whether a convention shall be called "to the electors qualified to vote for members of the Legislature, and in case a majority of the electors so qualified, voting at such election, shall decide in favor of such convention for such a purpose, the Legislature shall provide for the election of delegates to such convention."

This clause does not confer upon the Legislature any power to create disabilities not existing at the time under the Constitution, or to restrict the right of suffrage which the Constitution has established. It would be extraordinary if the Legislature had the right to determine who were entitled to the privilege of voting, and thus, in the exercise of an unlimited discretion, be able to disfranchise any class of citizens, when the right is already clearly established. Such a power would be liable to the grossest abuse, dangerous in the extreme, and obviously was never intended to be conferred. It is evident, I think, that the above section specifying the qualification of electors to pass upon the question whether or not there shall be a convention, plainly imports that the same electors, and no others, are qualified to vote for delegates, and any disfranchisement of any portion of said electors is a violation of this section, and therefore void.

The statute also violates section one of article one of the Constitution of this State, which declares that "no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." The "law of the land" does not mean a statute passed for the purpose of working the wrong, but the law which existed at the time when the alleged offence was perpetrated. The provision was in-

tended to restrict the powers of the Legislature, and to prevent any act which would deprive a party of his rights or disfranchise him until it was ascertained judicially that they had been forfeited (Wynehamer v. The People, 13 N. Y. 393, 394, and 416, and cases cited). The act in question pronounces a judgment and disfranchises the elector without judge or jury, or any of the forms required by the ordinary course of legal proceedings.

It also violates section six of article one, which declares that no person shall be held to answer for a crime except on presentment of a grand jury; and the second section of the same article, which secures the right of trial by jury in all cases in which it has heretofore been held inviolate. These objections are too apparent to require an extended discussion.

It is manifest that the case was rightly decided by the General Term; and the judgment reversing the judgment of the Special Term, overruling the demurrer and dismissing the Plaintiff's complaint, must be affirmed, with costs.

GROVER, CLERKE, and DWIGHT, JJ., were for affirming, on the ground that the act in question violated the true intent and meaning of the Constitution of the State of New York.

BACON, J., was for affirming, on the ground that the decisions of the Supreme Court of the United States had in effect decided that such an act as the one in question was in conflict with the Federal Constitution, but was of opinion that no provision of the Constitution of the State of New York was violated thereby.

MASON, J. (dissenting.)—By the second section of the thirteenth article of the Constitution of 1846, it is provided that at the general election in 1866, the question, "Shall there be a convention to revise the Constitution and amend the same?" shall be decided by the electors qualified to vote for members of the Legislature; and the section then declares, that " in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention for such purpose, the Legislature at its next session shall provide by law for the election

of delegates to such convention." The Constitution prescribes the qualifications of electors who shall vote on the question of calling the convention, but is entirely silent as to the qualifications of those who shall vote for the election of delegates to such convention, but leaves the whole question to the Legislature to provide by law for such election, and there is nothing in the Constitution restricting or limiting the power of the Legislature upon this subject.

The first section of article 2 of the Constitution has no application to the case. That section is limited in terms to the election of officers under the Constitution, and cannot, upon any just or reasonable construction, be extended to the election of delegates to frame a Constitution to supersede the existing one. Such delegates cannot be regarded as officers under the Constitution; neither their election, nor the authority or power of the delegates, emanates from the Constitution. The people, in whom all sovereignty of government resides, who may make and unmake Constitutions, speaking through the Constitution of 1846, have said that the Legislature shall provide for the election of delegates to such convention. This delegation of power from the people to the Legislature carries with it, by implication, upon the most familiar rules of construction, all the necessary incidents to the accomplishment of the object. The number of delegates to be chosen, the time and manner of their election, and who shall vote, are all embraced in the authority conferred upon the Legislature.

This, all will agree, must be so, if these delegates are not to be deemed officers under the Constitution, which, to my mind, is very clear they are not. These delegates exercise no function of government under the Constitution of 1846. They are elected to make a government, to frame a new Constitution, and bring into existence new officers, new powers of government, and new duties. Their duties precede the government which they create. Their whole duties are to create a new government, and not to exercise any functions under the old or existing government.

This proposition is too plain for discussion, and is most

ably sustained by the opinion of the Court below, upon which I am willing to repose without further discussion, as I regard the argument of this question, in the opinion of that Court, unanswerable.

This is the view which has always been taken of this subject. In the conventions of 1821 and 1846, delegates were elected who were disqualified to hold office under the Constitution, and their right to sit in the convention was never questioned.

The only remaining question in the case is, whether the Federal Constitution of the United States inhibits the legislation complained of, which prescribes the oath to be taken by the electors, when duly challenged, at the said election for delegates. The elector, when duly challenged, is required to take and subscribe the following oath, to entitle him to his vote, to wit: "I (A. B.) do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto; and did not willfully desert from the military or naval service of the United States, or leave this State to avoid draft during the late rebellion."

The people of the State have the sovereign right to frame their own Constitution, and to prescribe the qualifications of electors. This is a sovereign right in the States, too long conceded to them to be now surrendered. It is, to my mind, a right unquestionably belonging to the State. This right, I concede, must be exercised in subordination to the Constitution of the United States. It cannot be exercised otherwise, while the right to regulate the elective franchise resides in the States, as there is nothing in the Federal Constitution restricting the

exercise of that right. The general government is one of limited and delegated powers, and it is provided by the tenth article of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This power over the elective franchise in the States is certainly not delegated to the United States.

It only remains to be considered, whether the free and untrammelled exercise of this power to regulate the elective franchise is prohibited to the States by the Constitution of the United States. The Respondent's counsel in this case claims that it is, and that the act of the Legislature prescribing this form of oath to the elector, when challenged, is prohibited by the Federal Constitution; and the subdivision of the ninth section of the first article of the Constitution, which declares "that no bill of attainder, or ex post facto law, shall be passed," is relied upon as sustaining such position.

The Respondent claims and insists that the passage of this act by the Legislature which prohibited him from the exercise of his right to vote without taking this oath, is, in fact, the passage of a bill of attainder against him. This position cannot be sustained; attainder is scarcely known in American law. There were some bills of attainder passed by the States during and shortly after the Revolution, following the English precedents. It is to English criminal law that we are to look for a definition of this constitutional prohibition. Attainder is described in English criminal law to be, that extinction of civil rights and capacities which takes place wherever a person who has committed treason or felony receives sentence of death for his crime (Burr. Law Dic., vol. 1, p. 111; 1 Steph. Com. 408). The person so sentenced is called attaint or attainted. He is no longer of any credit or reputation. He cannot be a witness in any Court; neither is he capable of performing the functions of a man, for, by an anticipation of his punishment, he is already dead in law (4 Black. Com. 380; 4 Steph. Com. 446; 1 Burr. Law Dic. 111). The consequences of attainder are

forfeiture and corruption of blood (4 Black. Com. 381; 3 id. 251; 1 Burr. Law Dic. 111). Tomlins describes attainder to be *attinctura,* the stain or corruption of blood which arises from being condemned for any crime (vol. 1, p. 148), and that a bill of attainder is a bill brought into Parliament for attainting persons condemned for high treason (Same, Law Dic. 145, vol. 1).

Attainder is defined by Jacobs, in his Law Dictionary, to be the stain or corruption of the blood of a criminal capitally condemned (Jacobs' Law Dic., vol. 1, p. 163). Story says, bills of attainder, as they are technically called, are such special acts of the Legislature as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings (3 Story, Com. on the Const. 209).

Bills of attainder had acquired an established and technical signification long before the framing and adoption of the Constitution of the United States, and were well understood by the men who framed that instrument, and no one at that day ever imagined that it had any reference to regulating the elective franchise. The disfranchising, by depriving of the right of suffrage of any portion of the citizens of a State, was never in any country regarded as passing bills of attainder against them; and no such effect can be given to this clause of the Constitution without doing violence to its language, and pushing it, by a forced construction, beyond the well-recognized and received import of the word "employed."

It still remains to consider whether the prohibition against the passage of ex post facto laws extends to and embraces the statute in question. It is very clear it does not. These words, "ex post facto," have a definite technical signification, sanctioned by long usage. They had acquired an established definite signification long before British law was known in America. It was never understood to extend beyond criminal matters. An ex post facto law is defined to be a law whereby an act is declared to be a crime, and made punishable as such, when it was not a crime when done, or whereby the act of a

crime is aggravated in enormity or punishment. The plain and obvious meaning of this prohibition against the passage of ex post facto laws is, that the Legislature shall not pass any law after a fact done by any citizen which shall have relation to that fact, so as to punish that which was innocent when done, or to add to the punishment of that which was criminal, or to increase the malignity of a crime, or to retrench the rules of evidence so as to make conviction more easy. This is the definition laid down by the Supreme Court of the United States in Calder *v.* Bull (3 Dallas, 386), and fully approved by Chancellor Kent (1 Kent's Com., 8th ed. 409, 450. See, also, Fletcher *v.* Peck, 6 Cranch, 138). Chancellor Kent adds: "Ex post facto laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively" (1 Kent's Com., 8th ed. 450). Judge Story says, in delivering the opinion of the Court in Watson et al. *v.* Mercer (8 Peters' U. S. 109, 110), that it has been solemnly settled by that Court, that the phrase, "ex post facto laws," is not applicable to civil laws, but penal and criminal laws only,—in short, that ex post facto laws relate to penal and criminal proceedings which impose punishment or forfeitures, and not to civil proceedings which affect private rights retrospectively, citing Fletcher *v.* Peck (6 Cranch, 138), Calder *v.* Bull (3 Dall. 386), Ogden *v.* Saunders (12 Wheat. 266), Satterlee *v.* Matthewson (2 Peters, 380), all of which fully sustain this doctrine.

This clause of the Constitution of the United States came before the Supreme Court of this State at an early day, and Judges Spencer, Kent, and Yates all expressed separate opinions, and held that this term, "ex post facto law," as used in the Constitution, was limited to criminal cases. Such is the construction put upon this clause of the Constitution by the author of the Federalist, whose extensive and accurate knowledge of the true theory and principles of our government was, probably, not surpassed by any jurist or statesman in

this country. If the views above expressed are correct, this judgment must be reversed.

This statute under consideration is not in any sense a criminal statute. It creates no criminal offence, and does not undertake to define any. Neither does it prescribe any punishment for any existing criminal offence. It simply assumes to regulate the right of suffrage, and prescribes the qualifications of persons offering to vote for delegates to the constitutional convention. Such a law, I am confident, was never intended to be embraced by this constitutional prohibition.

The right of suffrage is a political right conferred by the Constitutional or laws of the States, and has ever been regarded as exclusively under State control. It may be granted or withheld, or given subject to such restrictions as the majority of those in whom the sovereignty resides may deem most conducive to the public welfare. If we adopt the argument of the Respondent's counsel in this case, and sustain this judgment, I am not able to perceive why all power in the State governments to ever restrict the right of suffrage is not struck down by this prohibition in the Federal Constitution against the passage of ex post facto laws. No State, under such a construction of the Federal Constitution, can ever withhold the right of suffrage from any persons who have heretofore enjoyed it, however much the public welfare or safety might demand it. If such an interference with the rights of the States to be perpetrated by a forced and hitherto unrecognized construction of this prohibitory clause of the Federal Constitution, I prefer it should come to us as a mandate from the Federal Court, submitted to and obeyed, when it comes, by a direct decision of the very question itself. I do not apprehend the day will ever arrive when such a decision will emanate from that Court. The two recent decisions in that Court, which the Court below felt constrained to regard as deciding this case in favor of the Plaintiff, fall far short of determining the case at bar; and no one, it seems to me, can read the dissenting opinion of the four Judges in that case,

and come to any other conclusion than that the decision in those cases are wrong, and ought certainly never to be extended.

In the first of those cases (Cummings v. The State of Missouri, 4 Wall. 277), it is only necessary to state that the Rev. Mr. Cummings, the Appellant, a Roman Catholic priest, was indicted and convicted by the Circuit Court of Pike county, Missouri, for a crime created by the State in its new Constitution, which the Court held was an ex post facto law to punish him for what he had done before the creation of the offence for which he was convicted. If the facts of the case were as the Court assumed them, there is nothing in that case which necessarily controverts the case at bar.

The case Ex parte Garland (4 Wal. 333) is certainly much stronger to support the Respondent's views.

The case holds the act of Congress which excluded from the practice of the law in the Courts of the United States all attorneys and counsellors of that Court who would not take what is commonly called the test-oath. It was held by the majority of the Court, in the case Ex parte Garland, that the act of Congress which required the attorneys already licensed and practising in the United States Courts to take and subscribe the test-oath, as a condition of the right to continue to practise, was invalid, because it imposed a punishment for some of the acts specified, which were not punishable at the time they were committed, and on this ground the act was held unconstitutional. There were four of the Judges who held, to my mind, an unanswerable argument that no such effect could be attached to the act. It is very clear to my mind that the decision of the Supreme Court of the United States, in each of these cases, has given an interpretation of this clause of the Constitution of the United States never contemplated by the framers, and wholly at variance with the early expounders of that instrument, and in conflict with all the decisions of the same Court up to the time of those decisions. These cases, however, have no application to the case at bar. The statute under consideration takes away no vested right, even of any citizen of the State.

As the Constitution of 1846 does not in any manner prescribe the qualifications of electors in voting for delegates to the constitutional convention, but confers upon the Legislature the duty to prescribe who shall vote, and to determine the oath which the elector shall take when challenged, no person can claim that he is unlawfully deprived of his right of suffrage by this act. None has the right to vote except those who have the right conferred by the statute, and then only upon the terms prescribed by the statute. This act of the Legislature, under consideration, is general in terms, and requires every citizen in the State who should claim the right to vote for delegates to the convention to take the same oath, if he shall be challenged, before he shall be entitled to vote. None of the persons who were in a condition that they could not take this oath, and were consequently deprived of the right to vote for the delegates to convention, can claim that they have been deprived of any constitutional rights, for no one had the right to vote except those prescribed by this legislative act. Nothing is taken away from them, but a right to vote is given by this act to all who will take the prescribed oath. The Court below, after holding that the Constitution did not prescribe the qualifications of electors in voting for delegates to the convention, but that the duty was devolved upon the Legislature to prescribe it, seem to have overlooked entirely the clear distinction which we have pointed out between the case of Cummings v. The State of Missouri and the case Ex parte Garland.

In the case of Cummings, he was already an ordained and commissioned priest; and in the case of Garland, he was already a licensed practising attorney and counsellor, having been duly licensed by the Court. In the case of this Plaintiff, he was not invested with rights as an elector authorized to vote for delegates to the constitutional convention prior to the passage of the act complained of. The statute, therefore, took away no rights from him.

There are no penalties or criminal offences created by the act, and the same is not in conflict with any constitutional pro-

vision, State or Federal. These views lead to reversal of the judgment of the Supreme Court.

HUNT, Ch.J., and WOODRUFF, J., concurred in this opinion of MASON, J.

Judgment affirmed. JOEL TIFFANY, State Reporter.

LEWIS F. ALLEN, RESPONDENT, *v.* THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF NEW YORK ET AL., APPELLANTS.

Sale of lands by State—Notice—Payment.

The failure of the Commissioners of the Land Office to give to the occupant of lands ordered to be resold notice to remove therefrom is not fatal to the title derived from such resale.

The statute providing for the sale of unappropriated lands belonging to the State, and requiring the purchaser of each tract to pay to the Surveyor-General within forty-eight hours after sale the first payment thereon, is not applicable to the cases of resale ordered because of failure to make payment.

APPEAL by the Defendants from a judgment rendered at General Term. in the Eighth District, affirming a judgment recovered by the Plaintiff at the Special Term, on demurrer to the complaint.

The action was brought to restrain the Defendants by injunction from proceeding either by action or by warrant under the statute to remove the Plaintiff from the possession of lot number six, Grand Island, in the Niagara river.

It was set forth in the complaint that on the 3d day of June, 1825, the lot was sold by the State to Samuel Leggett, for $1,250, on which $157 was paid, and a certificate was then executed to Leggett by the Surveyor-General.

On the first of November, 1833, Leggett assigned his in-

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98 *N. Y.* 453; 52 *App. Div.* 269 (65 *N. Y. Supp.* 473; 31 *Civ. Proc.* 78); 55 *App. Div.* 428 (66 *N. Y. Supp.* 993); 23 *Misc.* 450 (51 *N. Y. Supp.* 284).

Appeal—Right to—Public officers—Interest in controversy. 110 *N. Y.* 511 (18 *St. Rep.* 540).

terest in the certificate to Stephen White, and after several intermediate assignments, the Plaintiff became the owner of the certificates about the 3d of February, 1851, and that the Plaintiff has since that date been in the possession of the premises.

That on the 14th of October, 1858, in pursuance of notice duly published by the State Engineer and Surveyor, the lot was sold at public auction to J. Moreau Smith, for $1,846.26. By the conditions of the sale one-fourth part of the purchase-money was to be paid down at the sale, or within forty-eight hours thereafter.

J. Moreau Smith, purchaser at the resale, did not in fact pay one-fourth of the purchase-money till the 15th of January, 1859, when he made that payment, being $461.57, and executed to the State Engineer and Surveyor his bond for the remaining sum bid for the lot, and received from the State Engineer and Surveyor the certificate of sale as provided in section 25, part 1, title 5, chapter 9, article 3 of the Revised Statutes.

On the 15th of January, 1859, Mudgett and Herrick became the purchasers and assignees from Smith of his certificate and interest in the land, and applied for letters-patent, which were issued to them on the 28th of December, 1859, an undivided half to each.

No interest had been paid on the certificate to Leggett after the year 1849. Before 1850 the Plaintiff had paid the interest, but it was always done in pursuance of a notice or request from the office of the Attorney-General, and the Plaintiff supposed no proceedings could be taken to enforce payment without giving such notice. No actual notice of the proceedings for the resale had been given to the Plaintiff.

On the 15th of January, 1859, the Plaintiff was informed by Smith of his purchase of the land, and afterward, during that month, offered Smith to pay the purchase-money and expenses if he would assign his interest to the Palintiff, which Smith refused to do.

On the 18th of May, 1860, the Attorney-General served

on the Plaintiff a notice, that at a meeting of the Commissioners of the Land office, held the 1st of March, 1860, it was resolved that notice be given to the occupants of lands resold on the 14th of October, 1858, to remove therefrom, and in case of a neglect to comply with such notice that the District Attorney should be directed to enter a complaint before the County Judge pursuant to section 65 (52), part 1, chapter 9, title 5 of the Revised Statutes, and the Plaintiff was afterward informed by Fithian, District Attorney of Erie county, that he had been instructed by the Attorney-General to institute proceedings to remove the Plaintiff from the premises.

The bill prayed for an injunction, and that the letters-patent to Mudgett and Herrick be cancelled.

The Defendants demurred to the complaint.

The Special Term gave judgment for the Plaintiff, which the General Term affirmed, and the Defendants appeal to this Court.

The Supreme Court held that the omission of Smith to pay one-fourth of the purchase-money within forty-eight hours after the sale was a fatal defect, and made the sale void.

And that it was the duty of the Commissioners to give to the occupant a notice to remove from the land, under section 65, at the time they directed a resale of the premises, and that their omission to do so was fatal to the title derived from the resale.

A. J. Parker for Appellants.
John Ganson for Respondents.

HUNT, Ch.J.—The point "that it was the duty of the Commissioners to give to the occupant a notice to remove from the land at the time they directed a resale of the premises, and that their omission to do so was fatal to the title derived from the resale, has been recently passed upon in this Court. In Candee *v.* Hayward (37 N. Y. 653), the precise point was presented and was overruled. In giving the decision, Judge Grover uses the language following: "Section sixty-five provides that whenever the Commissioners direct a resale pur-

suant to the Act, they shall cause notice to be given to every occupant of such land to remove therefrom, and that, together with the two succeeding sections, provides a summary mode of removing such occupant, in case of neglect or refusal to comply with such notice. It is manifest that a compliance with these provisions by the Commissioners is not made a condition precedent to the power of sale, and that the validity of the sale is not dependent upon a compliance therewith. There is nothing in these sections indicating such an intention. The design of the Legislature was merely to furnish to the Commissioners a remedy for the speedy removal of the occupants from the land, and not to require notice to those interested, to enable them to protect their interest." Like the present, that was a case of resale on account of non-payment of arrears. That case is conclusive against the present point.

It was further held by the Court below, and is strenuously maintained by the Respondent's counsel here, that the omission of Smith to pay one-fourth of the purchase-money within forty-eight hours after the sale, was a fatal defect, and rendered the sale void. In providing for the sale of unappropriated lands belonging to the State, it is enacted in section 23 (1 R. S., p. 202), that "within forty-eight hours after each sale, the purchaser of each tract shall pay to the Surveyor-General the first payment required thereon, and execute a penal obligation conditioned for the payment of the residue of the purchase-money in six equal annual payments, with interest at the rate of six per cent." If the purchaser fail or neglect to make such payment and deliver such obligation, he shall forfeit the sum of fifty dollars, to be recovered with costs (§ 24).

In my opinion this section is not applicable to a case like the present, of a resale of lands and a neglect to keep up the payments, but only to a case of the first or original sale by the State. The statute first provides (§ 18) that the Commissioners of the Land Office may direct the Surveyor-General to sell the unappropriated lands belonging to this State, not otherwise directed to be disposed of, at public auction. If

they have been previously not only directed to be, but have actually been disposed of by a sale to a purchaser, this section does not apply. The Commissioners are then directed (§ 19) to furnish the Surveyor-General with a minimum price, and to designate the papers in which he shall advertise. They shall also (§ 20), previous to every sale, fix the amount of purchase-money to be paid at the sale, which shall not be less than twenty-five, nor more than seventy-five per cent. of the purchase money. It is next provided (§§ 21, 22) that all sales shall be held in the city of Albany, unless otherwise directed, and that eight weeks' previous notice shall be given of the time, place, and conditions of such sale. Then comes the section in question (§ 23), which provides that, within forty-eight hours after each sale, the purchaser shall pay the first payment required thereon, and execute a penal obligation for the payment of the residue, which if he neglect to do, he is subject to a penalty of fifty dollars (§ 24). On the receipt of such payment and the delivery of such obligation, the Surveyor-General shall give the purchaser a certificate containing the name of the purchaser, a description of the land, the sum paid, and the sum remaining due. This certificate authorizes the entry upon the land by the purchaser, its use and occupation by him, and upon payment of the amount remaining unpaid, letters-patent are to be issued to the purchaser by the Comptroller in the name of the State (§§ 26, 27).

It will be observed that these provisions make up a distinct system for disposing of the unsold lands of the State. It will be seen, also, that they contain no provision for redemption from the purchaser, and for the excellent reason that there is no one entitled to redeem or having any pretence of an interest in the land. The State is the owner and is the seller, giving a title without qualification or restriction. It is in making sales of this character only that we find the provision requiring the payment of one-fourth of the purchase-money within forty-eight hours after the sale.

Various provisions are there, and all relating to the sales of such lands and the duties of public officers, not important to be noticed here, until we reach the forty-sixth section. That section provides that if any payment of the obligations authorized to be taken by the Surveyor-General on a sale of lands (as before recited) shall remain due one year after the same ought to have been made, the Commissioners may direct the Comptroller to put the obligation in suit, or may direct the Surveyor-General to sell the land again for the payment of which the obligation is given, and all previous payments are declared to be forfeited to the State.

It was under this provision that the lot in question was sold to Smith. It had been sold in 1852 to Leggett, the obligation to pay the unpaid purchase-money had been given, the Plaintiff had been in possession for many years, but had neglected to pay his principal, or to make payments of his interest for several successive years. The lot was directed to be sold; was sold under the authority of section forty-six, above recited, and bid in by Mr. Smith. The statute then provides that if a purchaser is not found who offers the amount due for principal and interest, the Surveyor-General shall bid in the same for the State (§ 47), and that he may sell such lots to any person, always giving a preference to the last owner, if he shall apply within three months after the sale, for the amount at which the same was sold, on the same terms and conditions as he is authorized to sell the unappropriated lands of the State (§ 48).

This summary comprises a statement of the whole system. It shows that, as an original sale, a proportion of the purchase-money, not less than one-fourth nor more than three-fourths, to be fixed by the Commissioners, shall be paid within forty-eight hours after the sale; that an obligation shall be given for the balance, and that a certificate shall be issued to the purchaser. If the purchaser makes his remaining payments, he receives the letters-patent from the State for the land. If he does not, it may be ordered to be sold again. If so sold again, the purchaser at such last sale bids the whole

amount unpaid, and may be required by the Commissioners to pay the whole amount in cash, or such portion in cash, or at such other times, as they may direct. The statute is silent on the subject. In the event that no purchaser is found, but the Surveyor-General bids in the property, and the former owner applies to redeem, the Surveyor-General may sell to him on the like terms and conditions as on a sale of unappropriated lands. This would, probably, include a payment within forty-eight hours. I can, however, see absolutely nothing in the statute which makes this section (§ 23) applicable to the purchase by Smith. If I rightly apprehend the decision of Candee *v.* Hayward, such is the view of the learned Judge gave the opinion in that case. Whatever, therefore, may be the effect of the provision, it is not applicable to the case before us.

I am also of the opinion that upon its merits, if the statute is applicable, it is not entitled to the effect claimed for it. The argument is based upon the language of the Court in Sharp *v.* Speir (4 Hill, 76); Doughty *v.* Hope (3 Denio, 594); Powell *v.* Tuttle (3 Comst. 396); Bloom *v.* Burdick (1 Hill, 131), and many other cases, to the effect that the terms of a statute authority, by which a man is deprived of his property, must be strictly pursued. The books are, indeed, full of the cases to this effect, and the doctrine is expressed in the most emphatic language. It will be found, however, that nearly all of these cases are those of proceedings preliminary to the sale, when the requisites of the statute are in the nature of precedent conditions. The sale is in the nature of the execution of a power of attorney, and all the requirements to authorize such sale, like requirements of a power of attorney, must be strictly pursued (Hubbell *v.* Weldon, Lalor Sup. H. & D. 139). The principle is not so apparent when the duty has been completed in its substance, and subsequent omissions, in which the party has no interest, are the subject of inquiry.

The case may, however, be better illustrated by a refenence to the provisions of the Revised Statutes respecting the sale of lands for unpaid taxes (1 R. S. 408, 410). That statute

enacts (§ 66) that the owner or occupant of any land sold for taxes, may redeem the same at any time within two years after the last day of such sale. By section 76 it is further enacted that the Comptroller shall, at least six months before the expiration of the two years, cause to be published, at least once a week for six weeks successively, in all the public newspapers printed in this State, and in such form as he shall deem best calculated to give general notice, a notice that unless the lands sold shall be redeemed by a certain day they will be conveyed to the purchaser. Much discussion has been had on this section, and various decisions had in the different Courts of this State, whether the six weeks must terminate before the six months commences, and whether the omission to publish in a single newspaper will avoid the sale (Doughty *v.* Hope, 3 Denio, 594).

This latter question has been pending in this Court for the last six months, the Judges being, thus far, unable to agree upon a decision. Section 64 of the same statute enacts that the purchasers at such sales shall pay the amount of their respective bids to the Treasurer within forty-eight hours after the sale, and, if any purchaser shall fail or neglect to do so, the Attorney-General may commence a suit against him and recover the amount of his bid. Whatever doubt may have existed as to the other sections referred to, no such point has ever been raised upon section 64. I am not aware that it has ever been claimed in this Court, or in any Court of this State, that the delay to pay the amount of a bid for more than forty-eight hours rendered the sale void; and upon inquiry of my brethren, I cannot learn that any one of them had ever had such claim made before him. The tax sales of the State are protracted over a period of many weeks, and sometimes months; and, in the delay attendant upon so large an amount of sales, the fact of a longer delay than forty-eight hours must have occurred in many instances on every State sale. The absence of the claim, under such circumstances, furnishes a strong evidence that the claim would not be a good one. (Ryan *v.* N. Y. Central R. R. Co., 35 N. Y. 210.)

The distinction upon the statutory provisions is this: that in the case of a publication for six months in every newspaper in the State, the requirements is for the benefit, real or supposed, of the party whose lands are sold, and the law insists that it shall be performed before his title shall be divested. In the requirement that a payment, partial or total, shall be made within forty-eight hours after the sale, no reference is had to the interest of the party taxed. It is an arrangement of convenience, for the advantage of the State only, and is not made for the benefit of the party taxed. The State may, therefore, at its convenience, waive the requirement, and no one has cause of complaint. This distinction, as existing in the facts of the case, will be found in all the authorities cited upon the subject. Thus, in Sherwood *v.* Reade (7 Hill, 431), Judge Beardsley uses the following language: "The authority to sell, as conferred by this statute, is special in its nature, and must be strictly pursued or the sale will be invalid. The purchaser has notice of the extent and the limitations of the power to sell, for it dependes exclusively upon a public statute of the State, and he buys at his peril. If he purchases at a sale which the statute authorizes to be made, and which is conducted according to its provisions, a valid title is acquired; but if the sale is not thus authorized and conducted it is of no effect whatever,"

In that case the commissioners for loaning certain moneys deposited with the United States, according to notice, exposed for sale, the first Tuesday of February, certain premises owned and mortgaged to the State by one William Sherwood. They were struck off to William B. Sherwood, who, after some delay to enable him to obtain the money, declared his inability to complete the purchase. The Commissioners thereupon offered the premises again for sale, and they were purchased by the defendant Reade. The statute provided that in the event of a failure to complete the sale, like that of Sherwood, the Commissioners should themselves enter upon the lands on behalf of the State, lease them as well as they were able, and, on the first Tuesday of September following, again expose

them to sale, and then, if need be, take possession of the same on behalf of the State. The Court held that the sale to Reade was unauthorized by the statute, and that he acquired no title. The terms of the authority to sell had been manifestly departed from. The Chancellor, in the same case (8 Paige, 633), had held that a good title passed. His decision was reversed by the decision of the Court of Errors in 7 Hill, supra. So in Sharp *v.* Speir (4 Hill, 76), Judge Bronson lays down the rule that one claiming title to real estate in virtue of a sale made to him by a municipal corporation for unpaid taxes, must assume the onus of showing that everything has been regularly done by the corporation which the statute makes essential to the due execution of their power to sell. In that case it was held that a power to sell lands for taxes imposed on the land, did not justify a sale for taxes to be imposed upon the owners or occupants merely, and not on the lands. It was also held that a power to sell for taxes did not authorize a sale for an assessment for benefit simply.

Of the same general character are the numerous cases cited by the Respondent's counsel and referred to in Sherwood *v.* Reade and Sharp v. Speir. They are cases in which the preliminary requirements to the sale were not complied with, or in which the terms of a statute for redemption, evidently for the benefit of the former owner, had not been followed. None of them give countenance to the idea that, after a sale was had in pursuance of the statute, and the premises struck off to a regular bidder, the law in all its details having been complied with, the State would not be at liberty to waive payment at the time specified in the statute, or that mere indulgence or delay in exacting payment—payment having been afterward fully made—would avoid the title of the purchaser. The objection is not a sound one.

The judgment of the General and Special Term should be reversed, and judgment ordered for the Defendants on the demurrer, with costs.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

MARY O'GARA, APPELLANT, *v.* MARY E. EISENLOHR, ADMINISTRATRIX OF PATRICK DONNERY, RESPONDENT.

Husband and wife—Evidence of Marriage—Cohabitation—Evidence of death—Former wife.

It is competent to prove marriage by the act of cohabitation; by the acknowledgment of marriage by the parties, and by their reception as man and wife, and their reputation among their friends.

It is incumbent upon the party asserting the death of a party as the basis of a legal right, to establish affirmatively the fact of such death.

Evidence that a former wife was living during the life and cohabitation of the husband with a second wife cannot be rebutted by a presumption of the death of the first wife, and a remarriage with the second wife thereafter, for the purpose of making the final cohabitation with the second wife legal or their offspring legitimate.

THIS is an appeal from an order or judgment of the Supreme Court, made at General Term in the First District, affirming an order of the Surrogate of the city and county of New York, by which he refused to revoke letters of administration which had been granted ex parte to the Respondent, Mary E. Eisenlohr, upon the estate of Patrick Donnery.

Mary O'Gara, the Appellant, is the niece of Patrick Donnery. Mary E. Eisenlohr, the Respondent, claims to have been his wife. The question presented on this appeal is whether she was lawfully married to him.

Patrick Donnery died in January, 1856. He left no prop-

Evidence—Presumption. 50 *N. Y.* 192; 71 *N. Y.* 427; 114 *N. Y.* 118 (22 *St. Rep.* 746); 126 *N. Y.* 562 (38 *St. Rep.* 446); 165 *N. Y.* 390 (31 *Civ. Proc.* 373; 9 *Ann. Cas.* 353, 400); 8 *Hun,* 71; 24 *Hun,* 274; 55 *Hun,* 86 (28 *St. Rep.* 478; 8 *N. Y. Supp.* 245); 57 *App. Div.* 217 (68 *N. Y. Supp.* 292); *D.* 85 *App. Div.* 103 (82 *N. Y. Supp.* 1044); 42 *Misc.* 466 (87 *N. Y. Supp.* 430); 48 *How. Pr.* 7; 2 *Lans.* 7; 10 *Daly,* 434; 2 *Redf.* 458; 2 *Redf.* 523; 5 *Redf.* 496 3*Dem.* 333; 32 *St. Rep.* 996 (11 *N. Y. Supp.* 748).

Evidence—Marriage—Declarations. 1 *T. & C.* 601.

Letters of administration—Revocation—Power of surrogate. 41 *N. Y.* 276.

erty whatever of his own, but it turned out that a brother of his and an uncle of the Appellant, Mrs. O'Gara, one William Donnery, had died in 1851 intestate, and leaving a considerable property. The share of this property belonging to Patrick Donnery or his representatives is about $4,000. This fund is the real object of the present contest.

On the 5th of May, 1864, the Respondent, Mary E. Eisenlohr, having heard of this money, applied ex parte to the Surrogate of the city and county of New York for letters of administration on the estate of Patrick Donnery, alleging that she was his widow, and such letters were accordingly issued to her upon that allegation.

She then demanded Patrick Donnery's share in the estate of William Donnery of the present Appellant, Mrs. Mary O'Gara, who is the administratrix of this other brother, William Donnery. In this way Mrs. O'Gara, having been informed of the existence and the claims of this woman, immediately presented a petition to the Surrogate of the city and county of New York, according to statute, for the revocation of the letters of administration granted to Mary E. Eisenlohr on the estate of Patrick Donnery, on the ground that those letters were procured on the false statement that Mary E. Eisenlohr was his lawful wife and widow. The Surrogate refused to revoke the letters; an appeal was taken to the Supreme Court, which affirmed his order without any consideration whatever, and this appeal was then brought to this Court.

It is not disputed but that Patrick Donnery was married in May, 1844, by a justice of the peace in Bath, N. Y., to one Elmira Niles.

The questions presented here are,—first, whether this Elmira Niles was the Respondent, Mary E. Eisenlohr; and, second, whether this marriage was not void in consequence of Patrick Donnery having a former wife living at the time.

Patrick Donnery was a poor man, living and working in the mines in Pennsylvania from 1833 to 1842. He was married to and lived with a woman named Rose McKone, evidently

a person who was his superior. He owned a house and lot worth some $800, in which they lived. But he got in debt, and in 1842 he came to Brooklyn, N. Y., with the professed intention of bettering his fortune and redeeming his property. He never returned, but abandoned his wife, and in 1844, at Bath, N. Y., married another woman. His wife Rose was then living. She continued to live in Pennsylvania until 1852, when she came to New York, and has only been heard of once since.

W. H. Weeks and *C. W. Sanford* for Appellant.
Jas. Emott for Respondent.

MASON, J.—I have stated that Patrick Donnery was married to Rose McKone in the statement of facts. This was abundantly proved by the evidence. They lived and cohabited together as man and wife and from the year 1833 to 1840, and at this time they were living in a house which he built. He had at that time become much involved in debt, and left his wife, saying that he was going to Brooklyn to earn money to pay up his liabilities. Rose continued to live in this house of his until it was sold out by the Sheriff, and she continued to live in the place up to 1852, when she left, saying she was going to New York. During all that time they were received in the communities where they lived as man and wife, and were so regarded and understood by all their neighbors. They frequently declared that they were married, and Donnery introduced her as his wife, and at all times during this period called her such, and so she was treated and regarded. She had in her possession a certificate of her marriage to Donnery, which was read by McHugh, at the time she showed it to the priest, Father Malony.

It was entirely competent to prove the marriage by cohabitation, acknowledgment of the marriage by the parties themselves, reception of them as man and wife by their relatives and friends, and common reputation. (Matthews Pres. Ev. 283; 4 Johns. 52; 18 id. 346; 4 Comst. 230; 5 Day, 290; 9 Mass., 414; 8 Serg. & Rawle, 159.) Marriage with us is but

a civil contract, and no ceremonial is necessary to create this relation. A contract of marriage made "*per verba, de praesenti*" amounts to an actual marriage and is valid, and marriage is inferred when the parties live and cohabit together with all the concomitants of this case. The Surrogate was in error in excluding the declarations of Rose as to their marriage, but the case is quite sufficiently proved without it. The marriage, therefore, of the Respondent to Patrick Donnery, in May, 1844, was illegal and void, the former wife being then living. She was at that time living in Pennsylvania, and left in 1852, saying she was going to New York; and Patrick McHugh swears that he heard of her living in Brooklyn, about eight years before his examination in this case, which was in September, 1864, which would be 1857, and Patrick Donnery died in January, 1856. The great probability is, therefore, that she was living at the time of his death. She certainly left Pennsylvania in 1852, stating that she was going to New York, and there is no account of her after that, except what McHugh says, that he heard in 1857 that she was living in Brooklyn.

The general rule is, that the proof of the death of a person once living is incumbent upon the party who asserts the death, for it is presumed that the person still lives until the contrary is proved. (Wilson *v.* Hodges, 2 East, 312; Duke of Cumberland *v.* Graves, 9 Barb. 596, 608.)

The only ground upon which the decree or order appealed from can upon any pretence be sustained, is upon a supposed presumption of a remarriage between Donnery and the Respondent, after the death of Rose Donnery, his first wife.

The actual marriage of the Respondent with Donnery was unlawful and void, and the issue of that marriage was born while Rose, the first wife, was actually proved to be living, and this child cannot be legitimate upon any legal presumption. But it is claimed that, upon the facts above stated, we are to presume that Rose Donnery died before her husband, and then, that, after her death, the Respondent and Donnery were married, and that upon these two presumptions, without

any proof of the facts being so, it is claimed that it is established that the Respondent was the lawful wife of Patrick Donnery.

Presumptions of this kind require to be made with caution; and no one can look through the adjudged cases on this subject without being convinced that the legitimate limits of presumption have too frequently been overlooked. There are many cases in the books which cannot be considered as law, and which are condemned by the best commentators. (Best on Presumptions of Law and Fact, 46; Law Library [N. S.], vol. 31, p. 47.)

It has been well and truly said by Mr. Gresley, in his valuable treatise on equity evidence, while considering this subject, that the power of directing the jury to what length they might venture has often been stretched beyond due limits by the Judges, for, in cases of hardship, they have urged juries to presume facts which were manifestly incredible. (Gresley's Eq. Ev. 372, 373.) And such are the cases of Rex *v.* Twyning (2 Barn. & Ald. 386), and Wilkinson *v.* Payne (4 Term, 468), both of which have been severely criticised; and Eyre, Ch. B., characterized the latter case as one of "*presumption run mad.*" It must be confessed that decisions of this kind, requiring Courts and jurors to presume facts to be true which are probably, if not obviously false, are pernicious and ought not to be followed. The presuming of absurdities in order to meet the exigencies of a particular case must ever be fraught with mischief. (Best on Presumptions of Law and Fact, 47.) The cases referred to by the Respondent's counsel, of Fenton *v.* Reed (4 Johns. 52), and Rose *v.* Clark (8 Paige, 574), and Jackson *v.* Claw (18 Johns. 346), come far short of meeting the case at bar. In the two former, of Fenton *v.* Reed and Rose *v.* Clark, the death of the first husband was proved, and a cohabitation of the parties as man and wife after that event. All that these cases hold is that marriage may be presumed from cohabitation under circumstances that would be matrimonial but for the impediment of the previous existing mar-

riage, and which is continued after that impediment is removed and known to the parties to be so.

In the case of Jackson v. Claw there was cohabitation for a quarter of a century after the first wife had been absent seven years, and not heard from, and presumed to be dead. The Respondent relies with apparent confidence upon the case of Clayton and wife v. Wardell et al. (5 Barb. 214), which was affirmed in this Court (4 Coms. 230).

The second paragraph of the head note of that case, as reported in 5 Barb. 214, which holds that the former marriage of the party cannot be proved by cohabitation, reputation, and acknowledgment of the parties, is not law, and is opposed to elementary principles, and is repudiated by this Court in the decision of the same case, on appeal.

That case settles no law beyond the fact that the evidence in the case was insufficient to establish the first marriage.

In that case the reputation as to the first marriage seems to have been divided. The friends of Schenck seem to have understood that they were married, while the friends of the wife seem to have regarded their cohabitation as disreputable; and it is proper to say that a careful reading of the dissenting opinion of Judge Gardner on the case, concurred in as it was by Judges Bronson and Jewitt, inclines me to hold the case quite strictly to what is actually decided by the judgment of the Court in the case. The learned reporter, however, in the last paragraph of this head-note to the case, regards the decision as holding that it is competent to prove the first marriage by cohabitation, reputation, etc., where the proceeding is to recover a legacy and the right to it depends upon a valid prior marriage.

In the case at bar no presumption of a marriage between Donnery and the Respondent, after the death of Rose Donnery, can arise upon the facts appearing in this case. The Respondent proved her marriage with Donnery in May, 1844, which was clearly illegal and void, as Donnery's first wife was then living; and she continued to live and cohabit with him until his death in January, 1856. There is no evidence in this

case to show that she ever knew or suspected that he had another wife, until some time after Donnery died. Neither is there any evidence in the case that Donnery ever was informed or heard that his first wife, Rose, was dead, and none, certainly, that the Respondent had any such knowledge or belief. The Respondent's case cannot be sustained without indulging two presumptions of fact without any evidence to sustain either. The first is the death of Rose Donnery before her husband, and the second is a remarriage between Donnery and Respondent after her death. The first is sought to be made out upon the doctrines of conflicting presumptions. As a general rule the law presumes the continuance of life, and the death of neither husband nor wife will be presumed until an absence of seven years without being heard from.

The presumption of law, also, is in favor of innocence, and against the commission of crime and immorality. It is contended in this case that the presumption of law is that Rose Donnery died before her husband, when the consequence of her being alive is that the Respondent in this case and Donnery were cohabiting and living together as man and wife without any lawful marital relation existing between them. That the law will sooner presume that Rose has died, which involves no wrong, than it will that the Respondent and Donnery were living together in adultery, or without any legal marriage existing between them.

This presumption should not be allowed in the case at bar, for the following reasons: Donnery knew when he married the Respondent in 1844, that he committed the crime of bigamy, and that he was violating the laws of morality and religion in living with her as his wife while his first wife was still living. She continued to live at the same place he left her in 1840 up to 1852, and he had no reason to suppose or believe her to be dead. There was nothing in her health or age from which such an event would be expected by him. As to the Respondent, she was married to Donnery in 1844, and undoubtedly delieve him to be her lawful husband. She had never heard of his former wife or marriage so far as this case shows. She

consequently had no motive to contract marriage again with Donnery. There is no presumption of any guilty intent or misconduct involving any moral turpitude on her part in cohabiting and living with Donnery, under her marriage with him, honestly contracted by her, and duly solemnized in 1844.

As to Donnery, he is proved to have been guilty of bigamy in marrying the Respondent while his first wife Rose was living, and to have cohabited with her up to 1852, while he must have known his first wife was living; and any presumption of his innocence in continuing that relation up to his death in 1856, can scarcely be indulged. The presumption of the continuance of the life of Rose Donnery imputed no crime or conscious wrong to the Respondent in this case; and as to Donnery himself, his criminality is proved by the direct and positive evidence in the case; and that he should continue his unlawful marital relation with the Respondent was to be expected, as he now owed a moral duty at least to care for the child of their marriage. The death of Rose Donnery before her husband will not be presumed upon the facts and circumstances of the case.

Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction. I am aware that many of the elementary writers have said that presumptions may be looked upon as bold inferences pushed further than the facts established will strictly warrant. (Gresley's Eq. Ev. 372.) This is undoubtedly true, as applied to some of the adjudged cases, like Wilkinson v. Payne, where a jury, having presumed a marriage which under the circumstances was contrary almost to possibility, yet Lord Ellenborough refused a new trial.

These extreme cases of forced and extravagant presumptions are very justly dealt with by Sir W. D. Evans (see Appendix to Pothier, 331), where he says: "The principle adopted in Wilkinson *v.* Payne is certainly very dangerous in its tendency, as it goes to subvert the main foundations of the distinction between truth and falsehood." He adds, "Many cases

must occur in the administration of justice, where the wishes of those who are to decide must, from the nature of the circumstances, be in opposition to the legal right; but if we once begin to shake the rule that the law is to command and the judge to obey—if we once admit the propriety of professing to believe as true what we are actually convinced is not so, nobody can say where the deviation will stop, and legal certainty will be sacrificed at the shrine of judicial discretion." These views are quoted with approbation by Gresley, at page 374. Mr. Starkie, in speaking of this case of Wilkinson *v.* Payne, and Standen *v.* Standen (cited in 4 Term, 464), says it may be very questionable whether such decisions are not only contrary to sound policy, but even positively mischievous. He adds, do they not afford temptation to juries in hard cases, to trifle with the sacred obligation of an oath (2 Starkie's Ev. 755, Note f). I very much doubt the soundness of that principle of law which allows a technical force and efficacy to be given to evidence, which warrants such presumptions, beyond its mere natural tendency to convince the mind.

All I have said thus far upon the legal presumption of the death of Rose Donnery, will apply equally to the claim of the Respondent's counsel in this case of a presumed remarriage of the Respondent to Donnery, after the claimed death of Rose, his first wife. The Respondent, in this case, could not have a desire for such a second marriage. She supposed, and, doubtless, fully believed that her marriage to Donnery in 1844 was legal and valid; and, so far as she was concerned, no motive could have existed for a remarriage to a husband with whom she was living and rearing children, as she supposed, in lawful wedlock; and as to Donnery, he knew his marriage to the Respondent was unlawful, and the continuance of his cohabitation with her meretricious, for he must have known that his former wife was living up to 1852, as she continued to reside where he left her; and he had not the least reason to believe that she had died during the four years that she lived afterward, at the place he left her, and it is proper to take into consideration in this connection the fact that her departure from

Beaver Meadow, the place where she had resided, was open and notorious to all her friends; and to this must be added the evidence of McHugh, who testified that he heard of Rose as living in Brooklyn about a year after the death of Donnery himself.

The case, therefore, is destitute of evidence from which the inference can be deduced that Rose Donnery died before her husband, or from which a presumption of a marriage can be indulged; and I am not prepared to give such a forced and unreasonable presumption as the evidence in this case requires to justify the conclusion that Rose Donnery was dead, or that a marriage ever took place between the Respondent and Donnery.

These views lead to the conclusion that the order appealed from must be reversed, and the Surrogate directed to grant the prayer of the Appellant's petition.

JOEL TIFFANY,
State Reporter.

GEORGE GRANT RESPONDENT, *v.* SANFORD P. CHAPMAN, SHERIFF, APPELLANT.

General Assignment for benefit of Creditors—Right to sell on credit.

An assignment for the benefit of creditors is not rendered invalid by providing that the assignee shall not sell the assigned property upon credit.

When a portion of the assigned property had previously been levied upon by attachment, the assignor may provide for giving a preference to the attaching creditor, without making void said assignment.

CLERKE, J.—This is an action brought by the Plaintiff as assignee of Ambrose W. Barnes, under an assignment in trust for the benefit of creditors, to recover the value of goods amounting to $3,000 taken by the Defendant. He justified under a judgment and execution in favor of Horace B. Clafflin and others against the said Barnes, alleging that the assignment was fraudulent.

The assignment contained these provisions:

"The said party of the second part shall take possession of

all and singular the goods, chattels, property, and effects hereby assigned, and sell and dispose of the same upon such terms and conditions as in his judgment shall appear best, but not upon credit," etc.; and "shall first pay and disburse all the just and reasonable expenses, costs, and commissions of executing and carrying into affect the assignment;" and "all rent due or to become due on the store now occupied by the party of the first part, until the goods contained therein and thereby assigned can be disposed of."

Shall also with the net proceeds, etc., first pay all debts "designated in the schedule hereto annexed, marked Schedule B," and which was the first and only preferred class made by the assignment.

In Schedule B is the following provision:

"The amount that may be found due the sheriff of Madison county, by virtue of attachment in the Supreme Court in an action wherein Charles Bridge is Plaintiff, and Ambrose W. Barnes is Defendant, in which the Plaintiff claims $432.08, provided the attachment proceedings are sustained and are a lien upon the goods in the store."

It appeared in evidence that, immediately after the assignment, the assignee hired four clerks at a monthly salary of about $98 per month, and continued the business of the store, selling only at retail for about two months, and until the goods were taken in these proceedings. See folios 65, 66, and 67.

It also appeared, that, in the action of Charles Bridge against Ambrose W. Barnes, a judgment was recovered by Bridge for $537.85 upon an offer made by Barnes on the 11th day of December, 1861. The original claim in this suit was $432.08, and property of the appraised value of $1,020 was seized and held under the attachment.

I. It is expressly held in several cases by this Court, that an assignment is not void for withholding from the assignee any discretion to sell the trust property upon credit. In Carpenter v. Underwood (19 N. Y. 520).

COMSTOCK and SHELDEN, JJ., dissented upon this point; all the other judges concurring; and, I believe, the principle

has never since been questioned. In Nicholson v. Leavitt (2 Seld. [6 N. Y.] 510), an assignment, giving authority to sell for cash or upon credit, or partly for cash and partly upon credit, was adjudged void. It is contended, because the assignee actually sold the property assigned in the store by retail, that this fact, taken in connection with the language of the assignment, shows the purpose of the assignor was to hinder and delay creditors: But I certainly cannot see that this language authorizes any delay of any description, except such as is indispensably incident to such a trust. No powers are vested in the trustee, and no conditions are prescribed to him which could have any effect to vary or modify the duties with which the law invests him. He is directed to take possession of the property, and to sell and dispose of the same upon such terms and conditions as in his judgment shall appear best, but not upon credit. The only restriction is that he shall not sell upon credit; and we have already seen that this is not objectionable. As to the rest of the language employed, it directs him to do only what he could have done without any express direction.

II. The other objection is, that the clause in Schedule B, authorizing a preference to be given for the amount of the attachment levied upon a portion of the assigned property, necessarily hinders and delays creditors, and therefore makes the assignment void. But this is more or less the effect of every assignment of this description; yet they are sustained where no unnecessary delay is intended. Here the assignee is directed, as in the previous clause which we have been considering, to do precisely what he would have authority to do without any such provision. If the attachment should be sustained by the court, it would be a lien, and the assignee would not only be at liberty to discharge the assigned property from it, but he would be under compulsion to pay it. The assertion that, because the provision is conditional and contingent, it makes the assignment void, is not tenable. It could not be otherwise than conditional and contingent, as the validity of the attachment was questioned, and no positive direction could have

been given in relation to it until the decision of the Court should be ascertained. The remark so often made applies to this as well as to the other portions of this assignment, to which objection has been made. A provision in mere affirmance of the legal obligations of the assignee, authorizing him in terms to do precisely what the law, if the assignment was silent on the subject, would require him to do, could not affect the validity of the instrument. In my opinion none of the objections are tenable.

The judgment should be affirmed, with costs.

JOEL TIFFANY,
State Reporter.

WILLIAM LOESCHIGK, APPELLANT, *v.* RICHARD BALDWIN AND OTHERS, RESPONDENTS.

Question of fact—Evidence to sustain.

When there is any evidence to sustain the finding of the Judge, the Court of Appeals cannot inquire into the correctness of such findings. Such inquiry belongs exclusively to the General Term.

W. Watson for Appellant.
S. H. Thayer for Respondent.

GROVER, J.—There was evidence given upon the trial tending to establish all the facts found by the Judge. These facts must therefore be assumed by this Court to have been correctly found. The General Term had the power, and it was their duty to inquire whether the findings accorded with the weight of evidence, and, if not, to reverse them; but this Court has no such power. The inquiry as to the correctness of the findings of fact cannot be entertained by this Court, where there is any evidence to sustain them.

The Court has found that the sale of the goods and debts to Miles, made on the 6th of November, was in good faith for an adequate consideration, without any intent to defraud, and

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Appeal—Conflicting evidence—Power to reverse. 34 *Super. Ct.* 256.

without any intent, at that time, by any of the parties, that Baldwin & Co. should make an assignment in trust for creditors. Viewing the purchase by Miles in the light of these facts, there is no question as to its validity. The firm had the right to transfer to Miles the goods and debts, upon the terms agreed upon by them, if free from all intent to defraud any one. This having been so found, the transfer was not only valid between the parties, but also valid as to all others. This would not have been questioned by the Plaintiff but for the subsequent contract of the parties, by which Miles gave his notes on time for $8,000, in contemplation of an assignment by Baldwin & Co.

The Plaintiff's counsel insists that both contracts are to be regarded as one connected transaction, and their validity determined in that view. If the counsel is right in this, it would follow that the entire acts of the parties must be held fraudulent and void. The case would then be that Baldwin & Co., intending to make an assignment in trust for their creditors, Miles having knowledge of such intent, purchased from them their goods, &c., upon credit, gave his notes therefor on time, with intent that the firm should assign the notes instead of the property purchased by him, which was consummated by the assignment of the notes by the firm. This would have delayed the creditors of the firm for the term of credit given to Miles, and for this reason would have been fraudulent and void as to creditors so delayed.

But the Court did not so find the facts. The finding shows that the property was sold to and purchased by Miles, without any intention on the part of the firm, at that time, to make an assignment. This being so, we must inquire whether there was anything fraudulent in the new contract made a week afterward, which, it is found, was made with a view to an assignment by the firm. At this time Miles had the legal title to the property, was bound to sell the same, and retain from the proceeds the amount of his demands against and liabilities for the firm, and pay to them whatever surplus there

might be, upon the same credit afterward provided for in the notes given by him. By the new contract a difinite price was fixed upon the goods, which is found to have been the fair value, and Miles gave his notes therefor, upon the same credit provided for as to the surplus by the first contract, and his demands, etc., against the firm, were provided for in the assignment. This could not hinder or delay any creditor in any way whatever. The creditors were left in the same situation that they would have been had the second contract between Miles and the firm not been made, and the firm had assigned, instead of the notes, their claim against Miles for the surplus produced by the property transferred to him. If the price was the fair equivalent of this claim to the surplus, the creditors would not at all be affected by the second contract between the firm of Miles, but would receive, under the assignment made, the same amount, and at the same time, that they would had such contract not been made and the firm had made an assignment of their claim to the surplus under the first contract. This being so, the second contract was not fraudulent and void, as to the creditors of the firm, and the judgment affirming the judgment dismissing the plaintiff's complaint must be affirmed.

BACON, J.—All the facts necessary to sustain the judgment for the Defendants are clearly found by the Court upon sufficient evidence, and there seems to be nothing on which a question of law can seriously arise. The two transactions which the Plaintiff attempted to impeach were, the sale by Defendants to Miles, on the 6th of November, 1861, and the assignment made by them on the 14th of the same month to Charles S. Baldwin. In regard to the first, it is found that it was made in good faith upon a full and fair consideration, and that there was an actual delivery and change of possession of the property sold; and in regard to the assignment, it is found that it was a general assignment for the benefit of creditors, and without any interest on the part of the Defendants to hinder, delay, or defraud creditors.

It is further found that the Defendants were at no time under any injunction, and that Miles proceeded to sell the goods conveyed to him, and the Defendant Baldwin to execute the assignment, and thus the whole subject-matter of the litigation has been disposed of; and if the Plaintiff could succeed in affixing the stamp of illegality upon either of these transactions, the result to them would be utterly barren.

The Plaintiffs seek to connect the two transactions, and so to blend them that they may fall under the condemnation of a sale upon credit by the assignee. But neither the facts proved nor the findings of the Court will sustain any such conclusion; for it is abundantly shown that, at the time of the sale, on the 6th of November, there was no thought of an assignment by any of the parties, no such thing had been spoken of, nor was it within the contemplation of any of them; but the assignment was, as expressed by the witness Baldwin, an afterthought, and the two transactions entirely independent of each other.

Such being the state of the case, there being nothing to impeach either transaction as fraudulent, the property having been sold and the proceeds distributed without impeachment or intervention from any quarter, there remained absolutely nothing in the case of the Plaintiffs which entitled them to call for the aid of the Court; and the proper judgment was rendered dismissing the complaint with costs, and the judgment of the General Term should accordingly be affirmed.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

PATRICK KELLY, RESPONDENT, v. THE INDEMNITY FIRE INSURANCE COMPANY, APPELLANT.

Evidence—Bonds of Account—Credibility—Question of fact.

When books of account have been offered in evidence without objection, to establish the amount of goods in a building destroyed by fire, and it is claimed that the books have been fraudulently altered to increase the apparent quantity of goods, in such building, and evidence is given to sustain the credit of the books, the question thus raised is one of fact, and belongs to the jury to decide.

APPEAL from judgment of General Term, Fourth District, affirming judgment on verdict in favor of the Plaintiff.

L. Tremain for Appellant.
W. A. Beach for Respondent.

DWIGHT, J.—This was an action on a fire policy for $2,500, covering the Plaintiff's stock of boots, shoes, etc., in a store at Chicago, Illinois. Evidence was given tending to show that the goods were not the Plaintiff's, but that his name was used as a cloak for one Miller, his son-in-law; that a large portion of the goods alleged to have been destroyed were not owned by the Plaintiff, but were held for sale on commission for the firm of John Hill & Co., of Boston and Chicago, and that the amount and value of goods destroyed were fraudulently exaggerated by falsification of the Plaintiff's books of account, from which the amount of goods on hand at the time of the fire was in part ascertained. Accordingly, at the close of the trial, the Court submitted to the jury the following, among other questions, for special verdicts, viz.: What was the value of the goods in the store, belonging to the Plaintiff, at the time of the fire?

What was the amount of property destroyed or injured by the fire?

Have the account books of the Plaintiff been falsely or fraudulently altered?

The jury answered the last question in the negative; found the value of the Plaintiff's goods in the store at the time of the fire to be $14,631.16, and the amount destroyed $12,119.88, and found a general verdict for the Plaintiff for the amount of the policy.

The case states that, "to each and every of these findings the Defendant's counsel excepted in time." The ground of exception to the last question is not stated, but the objection considered in the opinion of the Supreme Court at General Term, and that urged on the argument here is, that the question was one for the Court, and not for the jury. Indeed, the objection that the Court erred in submitting this question to the jury is the only point made by the Appellant, in this Court, as a ground for the reversal of the judgment.

It seems that very great doubt was raised by the evidence whether any such amount of goods was destroyed, or was actually in the store, as was claimed by the Plaintiff in his proofs of loss, and as found by the jury; and so much so, that the Judge who wrote the opinion at the General Term, being being the same who tried the cause at the Circuit, says: "It is clear, to my mind, that the evidence was decidedly against the finding on that point;" and further, "I am quite convinced that injustice has been done the defendant in this verdict." But the question of the amount of goods destroyed had been submitted to the jury, without objection, and had been passed upon by them, and no motion for a new trial had been made, either upon the Judge's minutes or at Special Term, and the General Term was, no doubt, right in its conclusion that that question of fact could not be reviewed on an appeal from the judgment.

It is plain, therefore, that the only question which could be considered at the General Term, or which can be considered here, arises upon the submission to the jury of the question of the fraudulent alteration of the Plaintiff's book of account. I am unable to see that there was any error in such submission which can affect the judgment. These books were relied

upon as one class of evidence, to establish the fact of the amount and value of goods on hand at the time of the fire. As such they were offered by the Plaintiff, and received without objection. Upon inspection before the jury, the entries of purchases were found, in many instances, to have been altered, at some time not disclosed, in such a manner as largely to increase the amount of goods on hand, as well as to change the apparent character in which some of the goods were held. The alterations were such as to raise a strong presumption, and as, unexplained, must have entirely discredited the books and required their exclusion from the evidence, had the Court then requested so to rule. But the alterations were open to explanation; and evidence offered by the Plaintiff was received without objection, tending to explain them. The entries were also, to a large extent, corroborated by other evidence.

The material question was, whether the entries of bills of purchases, appearing upon the books, and claimed to have been altered, were, in fact, correct; whether the goods were actually purchased and received by the Plaintiff, as indicated by the books. The alterations especially complained of, and of which were claimed to have enhanced the amount of goods apparently on hand by over $10,000, were those in the account with John Hill & Co. It was claimed that the heading of this account had been altered from "John Hill & Co., commission account," to "John Hill & Co., old stock account," and that in four particular items the amount of goods apparently purchased or received from that firm had, by alterations, been increased over $10,000. But Miller, the agent of the Plaintiff, tesified that the goods embraced in those four items were actually purchased by him for the Plaintiff, from an old stock of John Hill & Co., in Chicago, and that the original was "Chicago account;" and John Hill, who was examined as a witness on commission, testified that his firm actually sold to the Plaintiff, at the several dates of the four specified items, the several amounts of goods mentioned in those items, and he

verified an extract from the books of his own firm, which showed entries of sales to the Plaintiff, corresponding precisely in dates and amounts with the four entries of purchases in the books of the Plaintiff, claimed to have been altered. This evidence, if believed, entirely rebutted the presumption of fraud raised by the apparent alterations complained of, and of course the degree of credit to be given to it was a question for the jury.

But, even without this evidence in explanation of the alterations, and corroborating the correctness of the entries as they stood, I do not see how the Court committed any error. There was no objection to the introduction of the books of account; when the alterations were discovered there was no request to exclude the books from the consideration of the jury; there was no motion for a nonsuit on the ground that there was not sufficient proof of the amount of property destroyed, nor, at the close of the trial, was there any request made to the Court to charge the jury as to the effect of the alterations, nor as to the degree of credit or discredit to be given to the books. Counsel who tried the cause for the Defendant were content with exceptions to the submission to the jury of the question whether there had been fraudulent alterations in the books of account. I think it is clear that this submission was neither erroneous nor to the prejudice of the Defendant. Counsel here insist that the question of the effect of these alterations should have been withdrawn from the jury and decided by the Court. But, first, we have seen that there was no request that the Court should rule upon that question; and, second, that, with the explanatory and corroborative evidence in the case, it was properly a question for the jury.

The judgment must be affirmed.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

THE PEOPLE EX REL. THOMAS KEARNEY, RESPONDENT, v. JAMES A. BELL, AUDITOR, ETC., APPELLANT.

Mandamus—Powers of Canal Board—Superintendents of Repairs.

The Canal Board have power to appoint Superintendents of Repairs upon that portion of the canals of the State which has been completed, and the repairs of which have been let by contract.

THIS case arose upon an order to show cause why a mandamus should not issue out of the Supreme Court to compel the Defendant, who was Auditor of the Canal Department, to approve the official bond of the Relator as Superintendent of Repairs, section No. 1, of the Erie Canal, to which office he had been appointed by the Canal Board in April, 1868. The bond, prepared in accordance with the statute, was presented to the Defendant, who refused to approve it, on the sole ground that the Canal Board had no authority to make the appointment. The case showed that section No. 1 was a completed section of the Erie Canal, and that the repairs thereon were, at the time of the appointment of the Relator, under contract to one Stevens, at $70,000 per annum. After hearing, on the order to show cause, the Special Term ordered that a peremptory mandamus issue, as above, which order was affirmed at the General Term, and the Defendant appeals to this Court.

J. H. Reynolds for Appellant.
J. K. Porter and *S. Hand* for Respondent.

GROVER, J.—The only question in this case is, whether the Canal Board have power to appoint Superintendents of Repairs upon that portion of the canals of the State that has been completed, the repairs of which have been let by contract.

The power to appoint this class of officers was conferred upon the Board by the Revised Statutes (vol. 1, p. 114, § 6). The duties of this class of officers are prescribed by statute, same vol., pages 236, 237. Their primary duties were to keep that portion of the canals committed to their care in repair, and to obey the orders of the Commissioner in charge in respect thereto. This power of appointment continued in the Board

until 1857, and in that year an act was passed (Laws of 1857, vol. 1, p. 214), by the fourteenth section of which this power was taken away from the Canal Board. By the ninth section the power to appoint Superintendents upon the unfinished portion of the canals was conferred upon the Contracting Board, and by the same section it was made the duty of the latter Board to dispense with the services of this class of officers in all cases where the repairs of the canals were placed under contract. This provision remained in force until 1860, when an act was passed (Laws of 1860, p. 152) repealing certain portions of the Act of 1857, among which was section three, and expressly enacting that all laws and parts of laws repealed by the nineteenth section of said act (Act of 1857), which are not inconsistent with the unrepealed provisions of said act, shall be, and the same are hereby revived, and shall be in full force after the passage of this act.

There is nothing in the unrepealed portions of the Act of 1857 inconsistent with the power of the Canal Board to appoint Superintendents, unless it is certain provisions authorizing the Contracting Board to let the repairs upon the unfinished portions of the canals by contract. This furnishes no argument against the power of the Canal Board to appoint the officers in question, for the reason that section nine, which dispenses with their services in cases where the repairs were under contract, is expressly repealed. This shows that the Legislature designed to and did authorize the employment of Superintendents upon the canals, when the repairs were placed under contract. It thus appears that the power of appointment of Superintendents was restored to the Canal Board. That such power was derived from the Revised Statutes, which in this respect were revived by the Act of 1860, supra.

The only remaining statute claimed to have any bearing upon the question is an act to amend an act entitled An Act to Enlarge the Powers and Define the Duties of the Contracting Board (being the Act of 1857 above referred to). The only part of this Statute having any relation to the question under consideration is section twelve (Laws of 1867, vol.

2, p. 1544), which provides as follows: "Nothing herein contained, nor in the act hereby amended, shall authorize the appointment of, or continue in office, beyond the first day of June next, any Superintendent of Repairs on the canals of this State."

We have already seen that the power of appointment in question was not at all given by the Act of 1857 (the Act amended by that of 1867), but that, on the contrary, it was given by the Revised Statutes, and taken away from the Canal Board by section nineteen of the Act of 1857. That by the Act of 1860 section nineteen was modified, and the power of appointment, conferred by the Revised Statutes upon the Canal Board, of this class of officers was restored, by reviving the laws repealed by that section. It follows that the above clause in the Act of 1867 does not at all touch the power of appointment by the Canal Board, because its language is expressly confined to that and the Act of 1857, from neither of which statutes is the power derived, but it is derived from other and independent statutes, which are by the very language excluded from the above clause in the Act of 1867.

It is argued, however, that the statute, although not expressly so declaring, shows a clear intention in the Legislature to abolish the office of Superintendent of Repairs. Had this been their intention, why was it not so declared? Why provide that no authority should be implied, from that and the Act of 1857, for their continuance beyond the first of June, instead of saying that the office should be abolished from and after that date? Can it be supposed that the Legislature was not aware that the authority of the Canal Board to make the appointment was not at all derived from the Act of 1857, and that the act, then on its passage, in no possible way could confer any such authority? The more reasonable presumption is, that as by the Act of 1857 this authority was conferred upon the Contracting Board, the clause in the Act of 1857 was inserted to prevent any implication of an intention to revive such authority in the latter Board. It is further argued that there could have been no intention to continue the office, for the

reason that it has been rendered unnecessary by the system of contracting for the repairs. The answer to this is, that whether the office is or is not necessary, is for the determination of the Legislature, and not for the Courts; that the statutes confer the power of appointment upon the Canal Board, and, by not making its exercise imperative, has vested that body with a discretion to make the appointment. That body has duly appointed the Relator, and the Defendant must act as to the approval of his official bond, the want of power in the Canal Board to make the appointment being the only ground upon which the Defendant refused to approve the bond.

The judgment of the Supreme Court awarding a mandamus to him to approve the same must be affirmed.

DWIGHT, J.—The only question in this case is as to the authority of the Canal Board in April, 1868, to appoint Superintendents of Repairs upon completed sections of the canals, and is merely a question of statutory construction.

By the Revised Statutes the Canal Board had the power of appointment and removal of Superintendents in their discretion (1 R. S. 229, § 69); and sections 99 et seq. of the same title, as amended by chapter 162, Laws of 1848, provided for the giving of official bonds by such Superintendents, to be approved by the Auditor of the Canal Department, and prescribed the duties of the officers so appointed and qualified. So the law stood till 1857, when, by chapter 105 of the Laws of that year, the Legislature enacted the system of repair contracts, which, with modifications, has ever since that time been in force.

Section one of that act requires the Contracting Board to let by contract, to the lowest bidder, all completed Superintendents' sections of the canal, and authorizes the same Board to let all or any uncompleted portions of said canal upon which, in their opinion, the repairs might be made by contract more thoroughly and economically than they then were or might thereafter be made by Superintendents of Repairs; and in its last clause provides that every contract shall extend over a period of from three to five years, and shall specify that the

repairs therein provided for shall be made under the immediate direction of the Commissioners in charge. Section two of the same act provided that the contractor for such portion of the canals so let should take, at a valuation to be fixed by the Commissioner in charge, all boats, tools, and implements owned by the State, and belonging to such portion of the canals, in part payment on his contract. Section three provides for the payment of the contractors by monthly drafts of the Commissioner in charge on the Auditor, unless the State, division, or resident engineer shall certify to the Commissioner that the contract is not properly performed, in respect either that the repairs are not promptly and properly made, or that unsuitable materials are used, or that the locks are not well attended, the navigation is not kept free from jams of boats, timber, or other obstructions, or that the feeders are neglected, so that there is not sufficient water for navigation; in which case such monthly draft shall be withheld, and the Contracting Board may declare such contract abandoned, and therefore the repairs on such section may be made by the Commissioner, until such contracts shall be relet. Section five empowers the contractor to sue and recover for all trespasses upon the canal or other works under his charge, and recover the same penalties, imposed by law or otherwise, as might be recovered for like offences when prosecuted by a Canal Superintendent. By section nine of the same act it was provided: "The Contracting Board shall have power, and it shall be their duty, to dispense with the office of Superintendent of Repairs in all cases where said repairs are placed under contract," viz., upon all finished portions of the canals; and in all other cases, viz., upon unfinished portions, "when, in their opinion, said repairs can be more thoroughly and economically done by placing the same under the supervision of the resident engineers; and in cases where they may not deem it for the best interests of the State to place said repairs under the supervision of the resident engineers, upon said unfinished portions of the canals, then said Contracting Board may appoint and locate so many Superintendents of Repairs as in their judgment the interests of the

State may require." And section nineteen expressly repealed "all laws or parts of laws which conflict with the provisions of this act, or authorize the appointment of any of the officers or persons whose appointment is herein provided for, in any other manner than according to the provisions of this act."

The next legislation, in order of time, which affects the question here occurred in 1860, whereby chapter eighty-six of the Laws of that year, sections six, seven, eight, nine, ten, eleven, twelve and fifteen of the Act of 1857, were repealed; and it was further enacted that "all laws and parts of laws repealed by the nineteenth section of the said Act of 1857, which are not inconsistent with the unrepealed provisions of the said act, shall be, and the same are hereby revived, and shall be in full force after the passage of this act." And here ends the history of legislation relating to the appointment of Superintendents, except that in 1867 the Legislature enacted a law which they entitled An Act to Amend the Act of 1857, in which occurs the following language: "Nothing herein contained, nor in the act hereby amended, shall authorize the appointment or continuance in office, beyond the first day of June next, of any Superintendent of Repairs."

We come now, therefore, to the inquiry, whether these various statutory provisions are susceptible of an intelligent construction; and if so, what was the law applicable to the appointment of Canal Superintendents at the time when the Canal Board assumed to make the appointment in question? To my mind the question presents no difficulty. In the first place, it is undisputed that, by the Revised Statutes, the power of appointment rested in the Canal Board, and that by the Act of 1857 it was taken from the Canal Board, and, so far as it was not wholly abrogated, was devolved upon the Contracting Board; and we have seen that, by the last-mentioned act, the office of Superintendent was dispensed with upon all finished portions of the canals, and its continuance authorized only upon such unfinished portions as the Contracting Board might not deem it for the best interests of the State to place under the supervision of the resident engineers.

But it is claimed, on the part of the Relator, that the Act of 1860, in its turn, repealed the provisions of the Act of 1857, which operates as above, and revived the provisions of the Revised Statutes which created the office of Superintendent, and conferred the power of appointment upon the Canal Board. I do not so construe that. Its effect as a repealing act is confined to certain enumerated sections of the Act of 1857, not embracing either the first, second, third, fifth, or nineteenth sections, and it purports to revive only such provisions of the Revised Statutes "as are not inconsistent with the unrepealed provision of the said Act of 1857." The question is therefore narrowed down to this: Is the appointment of Superintendents of Repairs by the Canal Board, as authorited by the Revised Statutes upon completed sections of the canals, inconsistent with the provisions of the above-mentioned unrepealed sections of the Act of 1857, or either of them? To my mind it is clearly so. The object of that act, as expressed in the unrepealed sections above enumerated, was clearly to subsitute the system of repairs by contract for that of repairs by Superintendents upon completed sections of the canals; and the whole duty of the Superintendents seems to have been devolved by those provisions upon the contractors.

The duties of the Superintendent, as defined by the provisions of the Revised Statutes above referred to, were "to keep in repairs such sections of the canals, and works connected therewith as should be committed to his charge;" "to make all necessary contracts for that purpose;" "faithfully to expend all such moneys as shall be placed in his hands by the Canal Commissioners or the Commissioners of the Canal Fund;" and "as often as once in sixty days to render his account to the Comptroller, who shall audit the same." This account was of moneys expended by the Superintendent for repairs, under the direction of the Commissioner in charge; and the latter was required "to certify upon the account that he had examined the same, and that the several disbursements specified therein were made under his direction on the canal, or for repairs necessary to be made thereon, and that he believed such disbursements to have been proper and reasonable, and to have been

made as charged." Here was a complete system for the repairs of the canals. It left no room for contractors, except such as the Superintendent should himself contract with, to do specific items of work, to be paid for by him out of moneys "placed in his hands by the Canal Commissioners, or the Commissioners of the Canal Fund."

Under this system the Superintendent was held responsible for the good condition of his section; and "under the direction of the Canal Commissioners, and especially of the Commissioners in charge," made such repairs as in his judgment were necessary to be made thereon. Under this system, also, the Superintendent must have had in charge and made use of all "those boats, tools, and implements owned by the State and belonging to each portion of the canal," which, under the contract system, the contractor was required to take at the valuation of the Commissioner. But it is unprofitable to enlarge upon the statement given above of the powers and duties of these officers under the Revised Statutes. That statement is in the language of the statute itself, and manifestly describes an office whose functions are wholly inconsistent with the duties and responsibilities assumed by the contractor under the requirements of the Act of 1857. Under that act, reference being had only to its unrepealed provisions, we have seen that the Contracting Board is required to let by contract all the completed sections of the canals, each contract to cover an entire section, and to embrace the entire work of making all necessary repairs of such portion of the canals, with its structures; of tending the locks; of maintaining a supply of water through the feeders, and of expediting navigation by keeping the canal free from jams of boats, timber, or other obstructions. The contractor was required to take off the hands of the State all its boats, tools, and implements now rendered useless to the latter by the discontinuance of all work on its own account. To the contractor, also, is delegated the authority to protect the canal and its structures from injury by trespassers; his work is to be done under the immediate direction of the Commissioner in charge, and he is paid by draft of the Commissioner

upon the Auditor, subject to be stopped only upon the certificate of an engineer that his contract is not well performed.

Here, again, is a complete system for the repair and the ordinary care and management of the canals—a system which leaves no room for Superintendents, with any of the functions of the officer so named in the Revised Statutes; and it may well be asked, if it was intended to continue the office of Superintendent upon sections under contract, what was it intended that its incumbent should do? The Relator answers, to superintend the operations of the contractors. But this cannot be, for two reasons: first, it is forbidden by the first section of the Act of 1857, which provides that the contractors shall do their work "under the *immediate* direction of the Commissioner in charge;" and, second, such a function does not belong to the office created by the Revised Statutes. That office, as we have seen, was one of specified powers and duties. The Canal Board was not authorized to appoint Superintendents to possess discretionary powers, nor to perform such duties as the Board should prescribe, but only to appoint to an office whose powers and duties were defined as above. It might well be argued, therefore, that when, by the subsequent act, all those powers and duties were devolved upon other persons, that office was abolished without express provision to that effect. But we are not left here to the argument by inference. The nineteenth section of the Act of 1857 expressly repealed all laws or parts of laws in conflict with the provisions of that act, and all such as authorized the appointment of any officers whose appointment was therein provided for in any other manner than according to the provisions of that act; and this would have been conclusive against the power of the Canal Board contended for by the Relator, but for the effect sought to be given to the Act of 1860, in respect to which, I think, consisted the error of the Supreme Court.

The learned Judge who wrote the opinion at the Special Term says that that act repealed section nineteen of the Act of 1857. If he meant it did so *in terms,* he fell into an error in his reading of the act. It does not purport, in terms, to repeal section nineteen. If he meant that it did so in effect, viz.,

by reviving the provisions of the Revised Statutes which had been repealed by that section, I think we have seen he gave too large an affect to the act in question. It did not revive those provisions, except so far as they were not inconsistent with the unrepealed provisions of the Act of 1857. When, therefore, it is seen that section nineteen of the Act of 1857 repealed all the provisions of the Revised Statutes which authorized the appointment of Superintendents by the Canal Board; that section nineteen is not repealed; and that those provisions of the Revised Statutes are not revived by the Act of 1860, for the reason that they are wholly inconsistent with the unrepealed provisions of the Act of 1857, establishing the system of contracts, it is impossible to escape the conclusion, that the power of the Canal Board to appoint to that office does not exist. I do not attempt to give any effect to the provision of the Act of 1867, quoted above; for, though it was the evident intention of the Legislature, by that provision, to put the abolition of the office of Superintendent beyond question, after the date specified, yet I do not think its terms apt to accomplish that purpose, and I think it clear that it was unnecessary, so far as the question here is concerned. It provided that nothing in the Act of 1857 should be construed to authorize the appointment or continuance in office, beyond the first day of June then next, of any Superintendent of Repairs. The Act of 1857 never authorized the appointment of Superintendents except by the Contracting Board, in their discretion, upon uncompleted sections of the canals; and this authority was conferred by section nine, which was repealed by the Act of 1860. The authority here claimed for the Canal Board existed, if at all, under the Revised Statutes. But I think it is demonstrated that that authority was abrogated by the Act of 1857, and was not revived by the Act of 1860. If so, the appointment of the Relator was without authority of law, and the Auditor was right in refusing to approve his bond.

The order appealed from should be reversed.

Judgment affirmed.

JOEL TIFFANY,
State Reporter.

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Such stipulations are regarded as against the policy of the

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Common Law, as having a tendency to exclude the jurisdiction of the Courts established, and provided with the means to entertain and decide legal controversies.

When the contract has been fully performed, and nothing remains to be done but to pay over the money, an action on the, common counts can be maintained.

HURST *v.* LITCHFIELD 179

ASSESSMENT—*Evidence of Regularity—Cloud on Title.*] When the tax or assessment complained of is void upon its face, or when the evidence necessary to enable a party to claim under it will of itself show the tax to be void, then a bill to set aside the assessment, or to remove the cloud from the title, will not lie.

But when the record itself is sufficient evidence to establish title, it constitutes a cloud upon such title, and an action will lie to remove it.

When the law requires that, in order to authorize certain work to be done in the city of Buffalo, the city assessors, or a majority of them, should certify that a majority of the property-holders in said city liable to be taxed or assessed to pay for the improvement had applied to have such work done, and such work was ordered to be done without the proper certificate of the assessors—held, that an assessment made to pay for such work was illegal and void, and that a bill would lie to set it aside.

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BILL OF EXCHANGE—*Forged Endorsement—Failure to Produce.*]
The Plaintiffs procured from the Defendants in Albany a draft drawn by the latter on a bank in New York, payable to the order of the Plaintiffs' agents then in West Virginia, and sent such draft to him to enable him to raise money there for the benefit of the Plaintiffs, such agent having no interest in the draft, and the draft was there received for deposit for safe-keeping by another, who forged the endorsement of the payee, and through such forged endorsement negotiated it to a bank there and absconded with the money, of all which due notice was given to both drawers and drawees, and the Plaintiffs demanded payment from the drawees, and gave due notice of non-payment.

The Virginia bank, claiming to have acquired title, forwarded the draft to New York, and caused it to be presented to the drawees and protested for non-payment, and refuse to give up the draft to the Plaintiffs, who have received from the payee (their agent) a formal assignment of the draft.

Held—That these facts do not entitle the Plaintiffs to maintain an action either at law or in equity against the drawers without the production of the draft, although there was no want of diligence in making demand of the drawees, so far as such demand can be made without such production, and notwithstanding the drawees still held the funds of the drawers, and are solvent, and ready to pay them to such drawers.

The allegation and proof in such action against the drawers that the negotiation of the draft was by a forged endorsement, and that the present holders, who claim title thereto and a right to recover thereon, are *out of the jurisdiction of this Court, in another State,* do not warrant the Plaintiffs to proceed upon such draft as a *lost draft,* either under our statute or in a Court of Equity, and recover on giving a bond of indemnity to save the Defendants harmless against any claim by virtue of such draft.

The Plaintiffs cannot in this matter cast upon the drawers the burden and hazard, in any future action by the holders of the draft, that such endorsement by the payee was a forgery, or the risk that the holders may show either that it was genuine or made under such circumstances as will conclude the payee, or that the circumstances attending the negotiations were such as to entitle them to retain and collect the draft.

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This burden and hazard rests upon the Plaintiffs, and the fact that such draft is held in another State makes no difference.
VAN ALSTYNE *v.* NATIONAL COMMERCIAL BANK..... 241

2. ——————*Liability of Bank—Failure to protest--Title to BillCollateral Securities.*] When a bank, having a draft for collection, neglects to protest the same, it not being paid at maturity, whereby the drawer is released from liability thereon, such bank is liable to all damage sustained by reason of such neglect.
And such bank being so liable, paying said draft or a judgment recovered thereon, is vested with the legal title to the same, and may maintain an action thereon against the acceptor of the draft.
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CHATTEL MORTGAGE—*Vendor—Possession of Mortgagor after Default—Sale to Third Person—Liability to Mortgagee.*] Where the mortgagor of chattels, in possession thereof after default in the payment of the mortgage debt, fraudulently delivered them to a third person for sale, representing that they were his property,

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and the third person, as agent for the mortgagor, sells the chattels, such third person is liable to the mortgagee for the value thereof, notwithstanding he acted in good faith, believing that the chattels were the property of the mortgagor, and paid the proceeds of the sale which he made, to the mortgagor, without reward for his services. The agent in a fraudulent disposition of the property of another, not being money nor negotiable paper, is liable therefor to the owner, although he act in good faith, without interest or reward, and in the belief that his principal is the owner.

Mere possession of personal property is not such an indicium of ownership or warrant to dispose of, as will protect a bonâ fide purchaser for value.

He who assumes to deal or intermeddle with chattels not his own must see to it that he has a warrant therefor from the owner, or from one who has authority from the owner to confer such warrant.

The mere continuance of the mortgagor in the possession after default in the payment of the mortgage debt, is not enough.

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COLLECTOR'S BOND—*Disability of Sureties—Delivery of Warrant.*] Immediately upon the receipt of his warrant for collecting taxes, the collector becomes a debtor to the county in the sum he is charged with collecting; and he can discharge such indebtedness either by producing the proper vouchers that he has paid over the money, or by his affidavit that certain taxes remain unpaid, and that upon diligent inquiry he has been unable to discover any property belonging to the persons charged with such taxes whereof he could levy the same.

It is no defence to an action brought against the collector for not paying over the moneys charged to him, that the warrant was not delivered to him in season to enable him to make the collections by law. He must show by proper vouchers that he has paid

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CONTRACT—*Attorney and Client—Compensation—Presumption.*]
A contract by which a large compensation is to be paid to the attorney by the client, on condition of success on an appeal which he advises, is to be scrutinized by the Court, and every presumption taken against the attorney.
In such case, if the attorney does not succeed on the appeal, he is to be deemed to be entitled to nothing.
HITCHINGS *v.* VAN BRUNT 34

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2. ——— *Failure of Performance by one Party—Recission—Damages.*] In every contract between parties, where the performance by one party presupposes some act to be done by the other party prior thereto, or contemporaneously therewith, the neglect or refusal to perform such act not only dispenses with the obligation which the other party was under to perform on his part, but, where the circumstances are such that a recission of the contract will not afford an adequate remedy to the party who was ready to perform, he is entitled to a recompense against the delinquent equal to the damages which such delinquency caused him.

If the special circumstances under which a contract is made be communicated by Plaintiff to Defendant, the damages resulting from a breach of such contract, being such as might have been reasonably contemplated by the parties on such failure, would be a proper measure of the amount to be awarded by the jury for such breach.

STARBIRD v. BARRONS 232

3. CONTRACT—*Offer of Reward—Information given before Offer—Assent.*] Where the Defendant offered a reward "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of a certain unknown female," such reward is not payable to one who never saw the offer until after the apprehension of the criminal, and who did nothing to promote such apprehension after the offer of reward was made, notwithstanding the apprehension was affected in consequence of information given by him before the reward was offered, and notwithstanding, also, he was active in procuring and giving evidence and communicating facts to the prosecuting officers after such apprehension, and on the trial, in the hope and expectation of receiving such reward.

Such an offer proposes compensation for what shall be done thereafter, not for what has been done already; and unless information be *thereafter* given which leads to both apprehension and conviction, the reward is not payable.

FITCH *v.* SNEDAKER 228

4. ——— PAROL—*Delivery——Statute of Frauds—Recission.*] An agreement to purchase back a quantity of lumber, which had been sold and delivered, but had not been paid for by the party holding the same, is a re-purchase; and, if the amount exceed fifty dollars, it must be in writing or be in part executed, to take it out of the Statute of Frauds.

C. purchased of B. a quantity of lumber, for which he gave his note payable in three months. Before the note became due, he informed B. that he could not meet the payment, and requested B. to buy back the lumber. They agreed upon the terms by parol, and B. was to take away the lumber as soon as the weather would admit. Before taking away the lumber, it was levied upon by the

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sheriff as the property of C. *Held,* that the title was in C., and the levy good as against B.

BLANCHARD *v.* TRIM 1

5. ———— *Receipt for Property levied on by Sheriff—Validity.*] Where a third party receipts property levied upon by the Sheriff, and thereby undertakes to return the same, and every part thereof, to the Sheriff, on demand, or to pay the judgment and Sheriff's fees, when sued for the amount of such judgment and fees, he cannot be permitted to prove on trial that the property receipted was not the property of the judgment debtor, or was of small value.

The contract of receipt agreeing to return the property levied upon, or pay the judgment, is a valid and binding contract.

CORNELL *v.* DAKIN 82

CONTRIBUTORY NEGLIGENCE—*Failure of Deceased to look and to listen for Train.*] It is negligence bordering upon rashness for a person to walk upon a railroad track without availing himself both of his sight and hearing, to ascertain the approach of a train of cars from behind as well as in front; and when the deceased has been guilty of such negligence, the company will not be liable for injuries received, when they might have been avoided by the exercise on the part of the deceased of such ordinary caution.

WILCOX *v.* ROME, WATERTOWN, &C., RAILROAD CO 23

2. ———————— *Imputation.*] Where a Railroad Company has been guilty of negligence in running into a passenger-car of another Company, and injuring the passengers, in an action for damages against said Company, it is not competent for the Defendant to prove that the Company whose passengers were injured by its carelessness, was likewise guilty of negligence.

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CREDITOR'S BILL—*Fraudulent Conveyance—Equitable Relief.*] Where, in a creditor's bill, filed to compel the application of choses in action, equitable interest, &c., to the payment of a judgment against A., it is charged that A. has made a fraudulent conveyance farm to H., and H. being made a party, it is claimed that the should be set side, and it appeared that the conveyance was in good faith, but that H. gave to A. a mortgage thereon

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which is unpaid, it is competent for the Court to decree that H. pay such mortgage to the receiver, to be applied on the judgment, although such mortgage was not named in the bill, nor in the prayer for relief.

In such cases, although it appeared that a third person, not a party to the suit, claimed to own the mortgage, and evidence tended to show an assignment by A. to him; still, it being proved and found that such assignment was fraudulent, it was proper to require H. to pay the mortgage to the receiver.

The objection that such third person should have been made a party, and that H. may hereafter be called upon to pay the mortgage to him, is waived by H. if he does not make it by answer or demurrer. And if, by reason of the omission of any notice of such mortgage in the bill, H. was left in ignorance that any claim to such mortgage would be made, and he was therefore surprised, he should have sought relief in the Court below, who would, no doubt, have allowed him to amend his answer.

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EJECTMENT—*Possession of Intermediate Grantee—Adverse Possession—Burden of Proof—Rights of Assignee in Bankruptcy—Limitation.*] In ejectment, of the title of a party, from whom, by mesne conveyances, the Plaintiff's title is deduced, be admitted or established, it is not necessary to prove his possession. Such possession is presumed, and the burden is cast upon the Defendant, if he so claims, to establish an adverse possession.

Nor, in such case, is it necessary for the Plaintiff to prove actual possession in any of the intermediate grantees through whom he derives his title, nor his own possession under the paper title.

The mere production of deeds, without any proof of possession under any one of them, does not ordinarily establish title; but, where the title of one of the grantors is admitted or established, the burden is not upon the Plaintiff of proving possession in the subsequent grantees.

A conveyance is not to be held void (under our statute declaring a deed of land held in adverse possession void) or mere proof that, at the time of such conveyance, the lands were in the possession of the Defendant.

It seems that a conveyance by an assignee in bankruptcy, under the laws of the United States, made in pursuance of a sale by order of Court, would not be void by force of our statute, even if the land were held in adverse possession.

The Act of Congress, limiting the assignee in bankruptcy to two years within which to bring actions, has no application to a cause of action arising in his own favor for injury to property, or a disseizin of lands vested in him by the proceedings.

A mere tort feasor cannot, in an action against him by such assignee or his grantee, impeach the title of the assignee by proof of irregularity in the proceedings in bankruptcy, or in the order of sale.

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ESTOPPEL—*Dividend—Non-resident Creditors—Insolvent Laws.*]
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EVIDENCE—*Books of Account—Credibility—Question of Fact.*]
When books of account have been offered in evidence without objection, to establish the amount of goods in a building destroyed by fire, and it is claimed that the books have been fraudulently altered to increase the apparent quantity of goods in such building, and evidence is given to sustain the credit of the books, the question thus raised is one of fact, and belongs to the jury to decide.
KELLY *v.* INDEMNITY FIRE INSURANCE COMPANY..... 326

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———— PROTEST, Liability of Bank for—Title to Bill of Exchange—Collateral Securities..... 58
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FALSE IMPRISONMENT—*Justification—Liability of Master for Trespass of Servant.*] It is no defence in an action of trespass and false imprisonment to show that those charged with committing the trespass acted in the matter in the utmost good faith, and arrested and searched the Plaintiff supposing her to have been guilty of committing a larceny. The calling to one's aid a policeman, to arrest and search the person of the Plaintiff without warrant, furnishes no excuse for the trespass. But when the trespass is committed by the servants or clerks of the Defendants, without their knowledge or direction, they are not to be deemed as acting under the employment of the Defendants so as to make the Defendants liable. It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act which the master himself is not authorized to do.
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GENERAL ASSIGNMENT—*Failure of Assignee to file Schedules and give Bond—Statute of* 1860.] That rule of construction, where the statute gives a remedy in addition to one existing at common law, without negative words, showing that the Legislature intended to make it exclusive, does not apply where the act creates no new remedy, but is designed to regulate one already existing. In the latter case the rule is to consider, *First,* the mischief to be remedied; and *Second,* the remedy intended to be applied.
JULIAND *v.* RATHBONE..... 51

——————FOR BENEFIT OF CREDITORS—*Right to sell on Credit.*] An assignment for the benefit of creditors is not rendered invalid by providing that the assignee shall not sell the assigned property upon credit.
When a portion of the assigned property had previously been levied upon by attachment, the assignor may provide for giving a preference to the attaching creditor, without making void said assignment.
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road Tracks—Additional Burden—Constitutional Prohibition.] The construction of a railroad along a street or avenue in a city imposes an additional burden upon the property-holders bounded by the center of said street or avenue, within the meaning of the constitutional provision which forbids such taking without compensation.

CRAIG *v.* ROCHESTER AND BRIGHTON RAILROAD CO. 194

HIGHWAYS—*Width of Road—Improved Lands—Injunction.*] Where the Commissioners of Highways order a road to be laid out for a part of the distance, three rods in width, and for the residue of the distance, which covers the bed or track of an old road used for more than twenty years, two rods in width, the proceedings are not thereby vitiated.

An injunction will not for such cause lie to restrain the Overseer of Highways from opening such road.

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HUSBAND AND WIFE—*Evidence of Marriage—Cohabitation—Evidence of Death—Former Wife.*] It is competent to prove marriage by the act of cohabitation; by the acknowledgment of marriage by the parties, and by their recetpion as man and wife, and their reputation among their friends.

It is incumbent upon the party asserting the death of a party as the basis of a legal right, to establish affirmatively the fact of such death.

Evidence that a former wife was living during the life and cohabitation of the husband with a second wife cannot be rebutted by a presumption of the death of the first wife, and a remarriage with the second wife thereafter, for the purpose of making the final cohabitation with the second wife legal or their offspring legitimate.

O'GARA *v.* EISENLOHR 310

——————— *Liability for Necessaries—Prohibition.*] A husband is bound to provide for the wife and children whatever is necessary for the suitable clothing and maintenance, according to his and their situation and condition in life. Ordinarily, he will be presumed to assent to her making upon his credit such purchases as, in the conduct of the domestic concerns, are proper for her management and supervision.

But if he sees fit to destroy such presumption by an express prohibition, no one having notice thereof may trust the wife in reliance upon his credit, unless the husband so neglects his duty that supplies become necessary.

In such case, the party seeking to recover, in the face of such

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prohibition, takes the burden of providing the neglect of the husband to supply such necessaries. And to that end, it is not enough to show that the goods sold were in their nature suitable and necessary, and that they came to the use of the family, or even that in part they came to the use of the husband himself, unless there be also evidence that the husband knew that they were purchased upon credit. *A fortiori*, it is error to reject evidence tending to show that the husband, after such prohibition, furnished his wife with money and means for her support, and that of the family.

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INSOLVENT LAWS—*Non-resident Creditors—Dividend—Estoppel.*] Creditors residing out of the jurisdiction of the State at the time the debt is contracted, are not to be affected in their rights by the insolvent laws of this State.

The fact that they seek to avail themselves of the Courts of this State to enforce their rights under such extra-territorial contract, does not render them amenable to the insolvent laws of this State.

But when a foreign creditor makes himself a party to a proceeding under the insolvent laws of this State which discharges the debt, and he accepts a dividend under the law, he is estopped from denying the regularity and validity of such proceedings.

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LAWS, INSOLVENT—Non-resident Creditors—Dividend—Estoppel 161
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LEASE TO TRUSTEE—*Implied Liabilities of Cestui que Trust.*]
Where a lease was procured to be made of certain lots to V., to hold in trust for certain partnership or an incorporated company, to succeed to said partnership upon an agreement that when the company should be incorporated the trustee should transfer the lease to it, and it would assume and perform all the covenants and the liabilities incurred by said trustee—*Held,* that said company when formed, having taken the assignment of said lease, &c., were liable themselves, and were bound to indemnify and save harmless said trustee.
VAN SCHAICK *v.* THIRD AVENUE RAILROAD *Co*..... 43

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MANDAMUS—*Powers of Canal Board—Superintendents of Repairs.*] The Canal Board have power to appoint Superintendents of Repairs upon that portion of the canals of the State which has been completed, and the repairs of which have been let by contract.
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MASTER AND SERVANT—*Negligence of Latter.*] The master is liable for damages occasioned by the negligence of his servant in performing the duties imposed upon him by the terms of his employment.
Where Defendants had hired Plaintiff to keep for them horses by the week, Defendants furnishing a servant to take charge of the horses; and the said servant, in taking care of the same, conducted so negligently, that he caused Plaintiff's barn and contents to be burned: *Held*—Defendants were liable.
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paid by mistake as to the amount due may be recovered back. It cannot be considered as a voluntary payment.

THE MAYOR, &c., *v.* ERBEN 270

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MOTION FOR NEW TRIAL, POWER OF JUDGE TO ENTERTAIN—*Insufficient evidence.*] Where, on the trial of an action upon a promissory note, to which the defence is infancy, the Defendant by clear and uncontradicted evidence establishes the defence, but the jury disregard the evidence and find for the Plaintiff, the Judge may entertain and grant a motion upon his minutes to set aside the verdict and order a new trial.

The fact that, but for such proof, the Plaintiff who produced the note and read it in evidence would have been entitled to the verdict, did not deprive the Judge of jurisdiction and power to make such order.

Whether such power exists independently of the Code of Procedure, or is to be derived from that section of the code (264), which authorizes a Judge "to set aside a verdict and grant a new trial for insufficient evidence," it exists and was, in the case stated, properly exercised.

ALGEO *v.* DUNCAN 106

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NATURALIZATION—*Retroactive Operation—Construction of Statutes.*] Naturalization, by virtue of the laws of the United States, has no retroactive operation to vest or confirm in the subject the title to lands which, by reason of his alienage, he could not inherit at the time of the death of the ancestor.

C. H. died May 2, 1848, seized of lands in this State. The Plaintiffs, who proved such relationship to the deceased as would entitle them to inherit, if not disqualified, were then in this country. One had declared his intention to become a citizen. AFTER the death of C. H. both were naturalized. In an action of ejectment to recover possession of such lands, *Held,* that upon the foregoing facts they were not entitled to recover, and were properly non-suited.

The statute passed April 10, 1843, section 1, authorizing a naturalized citizen, to whom lands would have descended if he had been a citizen at the time of the death of the person last seized, to continue to hold the same in like manner as if he had been a citizen at the time of such descent cast, applied only to those who were then naturalized citizens.

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——— *Running of a Horse at Large—Viciousness.*] The owner of a young horse, which is accustomed to run and kick from playfulness, when at large, is liable for any injury inflicted by his gambols or kicking, in the public street of a city, when permitted by his owner to go at large therein. It presents a question of negligence on the part of the owner, and not one of viciousness on the part of the animal.
DICKSON *v.* MCCOY 111

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PATENT, ASSIGNMENT OF —*Consideration expressed not Conclusive.*] The consideration expressed in the conveyance of an interest in a patent right by the Plaintiff to the Defendant, is not conclusive upon the parties. Either party is at liberty to show the true consideration.
A general exception to the report of the Referee, "and to each and every part thereof, both as to findings of fact and conclusions of law," is too general to be made available on appeal.
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PLAINTIFF AS WITNESS—Representatives of Deceased as Defendants 144
See SPECIFIC PERFORMANCE.

PLEADING—*Complaint—Demurrer—Interpretation.*] Where the language of a complaint is susceptible of an interpretation which will set forth a good cause of action, that interpretation is to be accepted rather than the one which will render the pleading invalid.

When a joint owner receives the whole money due on a joint contract, an action will lie in the name of the other owner, for his share of the money thus collected.

OLCOTT *v.* CARROLL..... 164

POLICY OF INSURANCE—*Classification of Risks.*] The terms in a policy of insurance, *"hazardous," extra-hazardous, specially hazardous,* and not *hazardous,* are well-understood technical terms in the business of insurance, and refer to distinct classes or degrees of hazards. *Extra-hazardous* and *specially hazardous* are not classifications of goods under the more general term *"hazardous,"* and are not to be confounded one with the other.

PINDAR *v.* THE CONTINENTAL INSURANCE CO..... 251

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PRINCIPAL AND SURETY—*Judgment—Release of Property of Principal.*] Where the principal debtor had transferred all his title to real estate before the docketing of the judgment against

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himself and security, a release of such estate from any supposed liens of the judgment by the judgment creditor, does not discharge the security from his liability as such.

BLYDENBURGH *v.* BINGHAM 38

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PROMISSORY NOTE—*Discharge of Maker—Extension by Holder.*] A maker of a note is not discharged from his liability thereon by the holder of such note making an agreement with another party that, in consideration said party will endorse, the time of its payment shall be extended.

Nor is such maker discharged, although he has, in equity, become surety that a co-maker of the note shall pay the same.

KENNEDY *v.* GOSS 277

2.——————*Usury—Original Consideration.*] The taking of usury, or including it in new notes by way of renewal of other valid notes, free from such taint, does not prevent a recovery of the sum actually due upon the valid notes, although the original notes were surrendered when the new notes were given.

Where a complaint alleged the making, etc., by the Defendants, of six notes, their non-payment at maturity, etc., and the giving of other six notes in renewal thereof, upon which the first six notes were surrendered, and stated that the Defendants alleged and claimed that the last six notes were void for usury; and the Defendants, by their answer, did set up such usury, and claimed the first six notes were paid and surrendered, and that the last notes were void for usury; the Plaintiff, in opening his case on the trial, admitted that usurious interest was included in the last six notes, whereupon a nonsuit was ordered. On appeal, held that this was erroneous.

The delivery of six notes which were void for usury was not payment and satisfaction of the six valid notes intended to be renewed thereby.

Upon the facts stated, the surrender of the first six notes was not a discharge of the cause of action, and the Plaintiff was entitled to recover the amount actually due.

WINSTED BANK *v.* WEBB 153

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QUESTION OF FACT—*Evidence to sustain.*] When there is any evidence to sustain the finding of the Judge, the Court of Appeals cannot inquire into the correctness of such findings. Such inquiry belongs exclusively to the General Term.
LOESCHIGK *v.* BALDWIN 322
——————— Evidence—Books of Account—Credibility... 326
See EVIDENCE.
2. ——————— *Referee's Report—Legal Error—Bar.*] Whenever a question of fact is found by a Judge or Referee contrary to what the undisputed evidence requires, a legal error is committed, which may be corrected on appeal to this Court.
When it is clearly in evidence that the cause of action sued upon was barred by a judgment for the same cause rendered in a former suit between the parties, the finding by the Judge that such judgment is not a bar, raises a question of law for the determination of this Court.
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3. ——————— *Res adjudicata.*]
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REPAIRS, SUPERINTENDENT OF—Powers of Canal Board.... 330
See MANDAMUS.

REPLEVIN—*Res adjudicata—Former Recovery for Portion of Goods—Evidence—Title.*] Where a Plaintiff in replevin took several chattels from the possession of the Defendants, and recovered final judgment for a part of them only, on a trial on which the title to the whole was contested, he cannot, on the trial of a subsequent replevin, brought to regain the possession of the residue of the chattels by him from whose possession they had been so taken, be permitted to allege title and prove it by the "same evidence by which he had endeavored to prove title to the same property" on the former title, and failed.

The effect of a verdict in replevin against the Plaintiff, where the Defendant by his answer merely puts in issue the allegations of the complaint, is not necessarily conclusive that the Plaintiff has no title to the property; it may have been found that the Defendant did not wrongfully detain. Its effect, therefore, depends upon extrinsic evidence.

But where the property was taken from the Defendant's possession, and it is proved that title to property was in fact the subject of the contest on that former trial, the verdict therein for the Defendant is conclusive.

ANGEL *v.* HOLLISTER..... 204

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See REPLEVIN.

——————— *Question of Fact.*]
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REWARD, OFFER OF—Information given before Offer—Assent.. 228
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RUNAWAY HORSE—Negligence 111
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SALE FOR TAXES—Certificate—Cloud on Title—Equitable Relief 169
See TAX SALE.

——— OF LANDS BY STATE—*Notice—Payment.*] The failure of the Commissioners of the Land Office to give to the occupant of lands ordered to be resold notice to remove therefrom is not fatal to the title derived from such resale.

The statute providing for the sale of unappropriated lands belonging to the State, and requiring the purchaser of each tract to pay to the Surveyor-General within forty-eight hours after sale the first payment thereon, is not applicable to the cases of resale ordered because of failure to make payment.

ALLEN *v.* COMMISSIONERS OF LAND OFFICE 300

——— ON CREDIT—General Assignment for Benefit of Creditors .. 319
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——— TO THIRD PERSON BY MORTGAGOR—Vendor—Liability to Mortgagee—Possession of Mortgagor 14
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SCHEDULES, Failure of Assignee under General Assignment to give Bond and File—Construction of Statute of 1860 51
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SECURITIES, COLLATERAL—Bill of Exchange—Liability of Bank for Failure to protest—Title to Bill 58
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SERVANT, LIABILITY OF MASTER FOR TRESPASS OF—False Imprisonment—Justification 174
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SERVICES, Payment of extra per cent for, is not Usury 258
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SHERIFF, RECEIPT FOR PROPERTY LEVIED ON BY—Validity of Contract 82
See CONTRACT. 4.

SPECIFIC PERFORMANCE—*Evidence—Party to Action—Husband of Defendant.*] In an action against the heirs-at-law and administrators of a deceased, to compel the specific performance of an alleged agreement by the deceased to convey land to the Plaintiff, the Plaintiff is entitled to be sworn as a witness on his own behalf, although he is not competent to testify to transactions had with the deceased personally.

The refusal to permit him to be sworn cannot be held an immaterial error, not calling for the reversal of the judgment, upon a conjecture or presumption that he could not have testified to any facts material to his case, because it is found affirmatively that the contract relied upon is not proved.

Non constat that he could not have given testimony to facts other than transactions had with the deceased personally, which as against the heirs-at-law would have tended to prove the existence and binding force of the contract alleged.

CARD *v.* CARD 144

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See SALE OF LANDS.

STATUTE OF FRAUDS—Parol Contract—Delivery—Rescission.. 1
See CONTRACT. 4.

——————— *Part delivery of Goods—Payment on Account.*] Where the Plaintiff and Defendant made a verbal agreement for the sale of cattle, at a price exceeding fifty dollars, without any actual delivery or payment of any part of the price, but the next day the Plaintiff called on the Defendant for a payment to bind "the bargain, so that there will be no chance to back out," and for that purpose the Defendant makes a payment of part of the price, the contract is valid and binding, within the Statute of Frauds of this State.

The requirement that the buyer shall, *at the time,* pay some part of the purchase-money, in our Statute is satisfied. In such case, the sale will be deemed made when the money was paid; for then the minds of the parties meet in the fact of sale, and a mutual intent is expressed to make it then valid and binding, according to the tenor of the previous oral treaty. Where a present absolute sale of cattle is verbally made, without actual delivery of the cattle to the buyer, but the seller agreed that the cattle may remain on his land, and be taken from time to time by the buyer, as he wants them to butcher, and the buyer gives directions to the seller to remove the cattle to another field for pasture, and he does so, and afterwards the buyer directs another removal, which is also complied with by the seller:

Query 1st. Is not this a sufficient delivery and acceptance of the cattle to satisfy the requirements of the Statute of Frauds? 2d. Is not the possession thereby in judgment of law changed, the

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seller holding the cattle thereafter not as owner, but as the agent and bailee of the buyer?
BISSELL *v.* BALCOM 212

STATUTE OF 1860—Construction—General Assignment—Failure of Assignee to file Schedules and give Bond—Statutory Remedy Additional to Common Law..... 51
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STATUTES OF NATURALIZATION—Construction—Retroactive Operation—Title of Lands in Alien 89
See NATURALIZATION.

SREET—*Highway—Bounding of Lot Adjoining—Centre of Street.*] Where the boundaries are on streets in the city, in the absence of evidence to the contrary in the grant, the lot will be presumed to be bounded by the centre of the street.

The intention of the grantor to otherwise bound the premises, is not manifested by a statement of the dimensions of the lot; and such statement must be subordinated to the description "bounded on the street, &c."
SHERMAN *v.* MCKEON 132

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SURETIES ON BOND OF COLLECTOR OF TAXES—Liability—Delivery of Warrant 115
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TAXES—Bond of Collector—Liability of Sureties—Delivery of Warrant 115
See COLLECTOR'S BOND.

TAX SALE—*Certificate—Cloud on Title—Equitable Relief.*] A certificate stating that a majority of those interested in all the different and several kinds of work to be done have petitioned, is not a compliance with the requirement that a majority of those interested in paving and grading should petition.

When a certificate of a tax sale is presumptive evidence of the facts therein contained, and is evidence in the Defendant's possession of a legal assessment and valid sale, such certificate is a cloud upon the title of one holding adversely thereto, and equity will interpose to give relief.
ALLEN *v.* CITY OF BUFFALO 169

TEST OATH—*Ex post facto Law—Unconstitutionality.*] That portion of the "Act to provide for a convention to revise and amend the Constitution," passed March 29, 1867, which provided that at the election of delegates no person shall vote who will not, if duly challenged, take and subscribe the following oath: "I do sol-

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emnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto; and did not willfully desert from the military or naval service of the United States, or leave this State to avoid the draft during the late rebellion."

Held void.

It violates both the Constitution of the United States and the Constitution of the State of New York. Per MILLER, J.

I is inconsistent with the just interpretation of the Constitution of the State of New York. Per GROVER, DWIGHT, and CLERKE, J.J

The decisions of the Supreme Court of the United States require that it be held to violate the Constitution of the United States, but it is in no conflict with the Constitution of New York. Per BACON, J.

HUNT, Ch.J., and MASON and WOODRUFF, J.J., dissented; holding the act valid, and not inconsistent with either Constitution.

GREEN *v.* SHUMWAY 282

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——— TO BILL OF EXCHANGE—Failure to protest—Liability of Bank—Collateral Securities 58

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UNDERTAKING ON APPEAL—*Recital—Inconsistency—Notice—Contemporaneous Acts.*] The reciting in an undertaking on an appeal that the party "intends to appeal," &c., is not inconsistent with the fact that the appeal and the giving the undertaking are *synchronous.* There is no impropriety in such a recital in an undertaking on an appeal.
FORREST *v.* HAVENS 141

USURY—New Notes—Original Consideration 153
See PROMISSORY NOTE. 2.

——— *Payment of extra per cent. for Services is not.*] It is not usurious for a party loaning money to contract that a certain per cent. beyond lawful interest shall be charged for time, service, and expenses spent, performed, and incurred in procuring the money for the accommodation of the Defendant.
The Defendant applied to Plaintiff to loan a sum of money; Plaintiff objected, because she had not on hand the amount desired. Defendant urged his necessities, and agreed to pay five per cent. as compensation for services, &c., if she would procure him the money, &c., in addition to lawful interest. *Held,* not to be usurious.
THURSTON *v.* CORNELL 258

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